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No. 97-1940

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1997

ARTHUR CALDERON, Warden, *Petitioner*,

v.

ROBERT CRUZ McLAIN, *Respondent*.

ON PETITION FOR WRIT OF CERTIORARI TO THE NINTH CIRCUIT UNITED STATES COURT OF APPEALS

REPLY TO OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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(CAPITAL CASE)

QUESTIONS PRESENTED

1. Does a capital defendant have an Eighth Amendment right to have his jury receive accurate clemency information at the sentencing phase of his capital trial?[1]

2. Does a capital defendant have a Fourteenth Amendment Due Process right to have his sentencing jury consider limitations on the possibility of commutation of a prison sentence of life without parole when the prosecution does not argue future dangerousness?

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1. The warden respectfully requests that the Court exercise its discretion to frame the two questions presented in this case as stated above. As explained in the body of this reply at page one, these are more pointed statements of the original questions presented because of the misrepresentation allegation contained in the opposition to the petition for writ of certiorari. Opp. at 1. The warden only seeks to make the issues in the case clearer for the Court. The warden respectfully submits that the issues have not changed at all by the rephrasing.

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REPLY TO OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Petitioner, Arthur Calderon, Warden, California State Prison at San Quentin (the warden), hereby replies to respondent Robert Cruz McLain's (McLain) Opposition To Petition For Writ Of Certiorari. As explained below, the opposition is insubstantial.

I. The Warden Accurately Has Stated The Record In This Case

McLain makes two allegations of misrepresentation of the record by the warden. Neither are well-taken.

A. The First Question Presented Accurately Identifies This Capital Case As One Where The Sentencing Jury Was Advised That One Of The Sentence Alternatives Was Life Imprisonment Without The Possibility Of Parole

First, McLain alleges that the first question presented in the Petition for Writ of Certiorari "misstates the record" in referring to the accuracy of information presented to a capital sentencing jury. He complains the reference to "'a sentence of life *with* the possibility of parole through commutation'" is inappropriate because this case does not involve a governor's power to commute a prison sentence of life *with* the possibility of parole. Opp. at 1, emphasis added by McLain. The warden's first question presented accurately states the record in this case.

The warden's first question presented in the Petition For Writ of Certiorari simply describes the legal regime in California that allows a sentence of life imprisonment without the possibility of parole to be reduced to life imprisonment with the possibility of parole through commutation. The petition exactly quotes the instruction given in this case that identifies the subject sentencing alternative as life without the possibility of parole, subject to the governor's commutation power. Pet at 6.

More succinctly put, the first question presented is whether a capital defendant has at the sentencing phase of trial an Eighth Amendment right to have his sentencer receive accurate clemency information. This is a clemency case. "The term 'clemency' refers not only to full or conditional pardons, but also commutations, remissions of fines, and reprieves." Herrera v. Collins, 506 U.S. 390, 412 n.12. (1993). California law is in accord. "Commutation is . . . [a] partial pardon." Way v. Superior Court, 141 Cal.Rptr. 383, 391 (1977).

As shown in greater detail below, this case asks why the Eighth Amendment should extend capital sentencing considerations to the extra-judicial private views of the governor and the California Supreme Court that may be aired in discretionary commutation proceedings. In the same vein, this case also asks whether the Fourteenth Amendment Due Process Clause should extend capital sentencing considerations to conceivable limitations on the possibility of commutation of a prison sentence of life without parole when the prosecution does not argue future dangerousness.

B. The Second Question Presented Accurately Identifies This Capital Case As One Where The Prosecution Did Not Argue The Defendant's Future Dangerousness

Next, McLain alleges that the second question presented "misstates the record" in stating that this a case where "'the prosecution [did] not argue future dangerousness.'" Opp. at 1. Again, the allegation is unfounded. In support of this claim, McLain does not supply any specific example of any argument by the prosecutor in his case urging the jury to impose the death penalty because of the future danger McLain posed to society if ever returned there. Instead, he points to a non-specific conclusion of the district court that there were "rhetorical efforts to '. . . bring home the point that [McLain] would pose a constant danger so long as he remained alive.'" Opp. at 1.

The conclusion is not supported by the record. To prove the point, the warden presents Supplemental Appendix A, which

contains the entire closing penalty phase arguments of the prosecutor in this case. McLain fails to dispute, or even mention, two key assertions in the petition: that the prosecutor specifically admonished the jury that it could not base its penalty decision based on the defendant's future dangerousness; and further, that there was a specific penalty phase instruction in this case prohibiting the jury from considering "whether to impose the death penalty on the theory that the defendant may commit future crimes or . . . the defendant's propensity to commit future crimes, as that is not a proper subject for your consideration."

Given the prosecutor's own admonishment and the explicit instruction, there is no support for the vague non-specific conclusion that the prosecutor somehow impliedly suggested to the jury that McLain "'would pose a constant danger so long as he remained alive.'" Opp. at 1. The rule has long been that the Constitution does not assume that prosecutors intend or that jurors draw the most invidious inferences from ambiguous remarks made during lengthy prosecution arguments. Boyde v. California, 494 U.S. 370, 384 (1990).

A fair reading of the prosecutor's closing argument, in fact, supports the conclusion that the prosecution did ***not*** argue future dangerousness. At most, the prosecutor commented -- as was his right -- on the moral depravity of McLain's criminal background and character. Neither trial counsel nor the trial court perceived anything the prosecutor said in closing argument to be in violation of the court's order prohibiting the jury's consideration of the defendant's future dangerousness.[2/] Also, neither on appeal nor on collateral review has McLain ever filed a claim that the prosecutor violated the trial court's order.

Finally, the question at issue is what a prosecutor can comment on if a prosecutor cannot comment on evidence as it reflects upon a defendant's moral guilt without conflating it with

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2. For emphasis and ease of reference, the warden has highlighted in the supplemental appendix the portions of the prosecutor's argument that focuses on the defendant's moral blameworthiness. See, Supp. Appendix A. at 8-10, 14-24, 29-32, 60-62, 67-69.

future dangerousness. While the Federal Constitution no longer requires prosecutors to focus the capital jury's sentencing discretion affirmatively on the defendant's moral guilt, see, Payne v. Tennessee, 501 U.S. 808 (1991), prosecutors should not be penalized when they must do so under state law. McLain's claim of misrepresentation is meritless.

II. The Court Should Grant Certiorari To Consider When The Prosecutor Does Not Argue Future Dangerousness At Trial The Eighth And Fourteenth Amendments Should Extend Capital Sentencing Considerations To The Extra-judicial Private Views Of The Governor And The California Supreme Court Which May Be Aired In Discretionary Commutation Proceedings

On the merits, McLain argues that this case "is neither controversial nor precedentially significant," and simply represents "the application of well-settled precedents to a factual situation unlikely to arise again in any other case." Opp. at 3. This contention is unavailing.

McLain does not dispute the warden's assertion that this Court has never adopted the broad proposition that capital defendants have a free-standing Eighth Amendment right to accurate sentencing information. McLain does not even dispute the warden's position that this Court has rejected that proposition both in Barefoot v. Estelle, 463 U.S. 880 (1983), and Romano v. Oklahoma, 512 U.S. 1 (1994). The breadth of the proposition in Hamilton v. Vasquez, 17 F.3d 1199 (9th Cir. 1994) cert. den. 512 U.S. 1220 (1994), (the Hamilton rule), puts it on a collision course with this Court's decisions.

As stated earlier, the narrowest reading of the Hamilton rule is that capital defendants have an Eighth Amendment right to accurate clemency information. Even this narrow reading of the Ninth Circuit's rule has tremendous implications nationwide. "[A]ll 36 States that authorize capital punishment have constitutional or statutory provisions for clemency." Herrera v. Collins, 506 U.S. at

414, Ohio Adult Parole Authority v. Woodard, __ U.S. __, 118 S. Ct. 1244, 1256 n.4 (1998) (Stevens, J., conc. & diss. in part) (same).

McLain's assertion that this is purely a local matter fails to recognize that this rule forces States, under certain circumstances, to provide clemency information to capital sentencing juries, and to provide nothing less than a portrayal of the "true" likelihood of the possibility of clemency. As shown below, it is impossible for the States to give any jury in any state a "true" indication of the likelihood of clemency being granted because of the nature of clemency itself.[3]

A. Certiorari Review Is Warranted Because The Ninth Circuit's "Accurate Clemency Information" Rule Is In Conflict With The Brightline Distinction Drawn In Simmons v. South Carolina, 512 U.S. 154 (1994) Based On The Legal Nature Of A "Life Sentence"

The Hamilton rule that a capital defendant has a constitutional right to accurate clemency information without any

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3. McLain's observation that California's commutation instruction generally has not been given since 1984 misses the point. Fifteen years ago when this Court granted certiorari in Ramos v. California, 463 U.S. 992 (1983), the fact that California was the only state in the nation to inject the commutation issue into criminal cases did not diminish the importance of the case. Indeed, as recognized in Ramos, in any capital state where clemency is available, the questions of clemency or parole usually arise from the defense or jurors themselves. Id. at 1027 n.12 (Marshall, J., Diss.); E.g. People v. Carpenter, 935 P.2d 708, 732 (1997) (juror wanted to know if the defendant could ever get out). California law still approves of a Morse-like instruction being given if the question of parole or commutation is raised by the defense or a juror. People v. Ramos, 689 P.2d 430, 444 n.12 (1984). As this Court well knows from the Ramos and Simmons cases, jurors often inquire about the prospects of a defendant's release. See also, J.Mark Lane, "Is There Life Without Parole?": A Capital Defendant's Right To A Meaningful Alternative Sentence, 26 Loy.L.A.L.Rev. 327, 335 (1993) (17-year study of 280 capital cases in Georgia "revealed that sentencing juries asked questions about the defendant's potential eligibility for parole in twenty-five percent of all relevant cases.").

regard to the legal nature of clemency itself is short-sighted and in conflict with this Court's decision in Simmons v. South Carolina, 512 U.S. 154 (1994). Hamilton ignores the fact that Simmons' rebuttal right to "accurate" parole information turns on bright-line distinction based on the legal nature of a "life sentence."

In states where the legal nature of a "life sentence" withholds entirely the discretion to grant parole, capital defendants have a constitutional right of rebuttal to portray "accurately" the jury's sentencing alternative to death as life without the possibility of parole. In states where the legal nature of a "life sentence" allows discretionary parole releases, defendants have no constitutional right of rebuttal to portray "accurately" parole availability.

The reason there is no Simmons violation in the later situation, even if a "life sentence" more accurately indicates a prison sentence with no possibility of parole for at least 35 years, is because "how the jury's knowledge of parole availability will affect the decision whether or not to impose the death penalty is speculative." 512 U.S. at 168, see, e.g. Muniz v. Johnson, 132 F.2d 214, 224 (5th Cir. 1998).

Under this rationale, it follows that in states where the legal nature of clemency withholds entirely the discretion to grant clemency, capital defendants might have a constitutional right of rebuttal to "accurately" portray the jury's sentencing alternative to death as life without the possibility of clemency. However, in states where the legal nature of clemency allows discretionary clemency releases, defendants have no constitutional right of rebuttal to portray "accurately" clemency availability.

But, the truth is, "***all*** 36 States that authorize capital punishment have constitutional or statutory provisions for clemency." Herrera v. Collins, 506 U.S. at 414, emphasis added. In other words, no capital punishment state anywhere in this country withholds entirely the discretion to grant clemency, and, therefore "how the jury's knowledge of [clemency] availability will affect the decision whether or not to impose the death penalty is speculative." Simmons v. South Carolina, 512 U.S. at 168. Thus, the Hamilton rule ignores Simmons' focus on the legal availability of release.

B. Certiorari Review Is Warranted Because The Ninth Circuit's "Accurate Clemency Information" Rule Is In Conflict With The Longstanding Recognition Reaffirmed In Ohio Adult Parole Authority v. Woodard, U.S. (1998) That Clemency Review Is Inherently An Extra-judicial Remedy That Allows The Reviewer Unbridled Discretion To Exercise Mercy

As a form of clemency, a petition for commutation "'is simply a unilateral hope.'" Ohio Adult Parole Authority v. Woodard, _ U.S. at _, 118 S. Ct. at 1249. It is a request for relief "as a matter of grace, thus allowing the executive to consider a wide range of factors not comprehended by earlier judicial proceedings and sentencing determinations." Id. at 1250. In California, "a commutation of sentence is in the nature of a favor", Green v. Gordon, 246 P.2d 38, 39 (1952), that serves as the "ultimate remedy" available "[i]f at the end of court procedures there is claimed to persist a miscarriage of justice, despite all the precautions of the law to the contrary. . . ." In re Hororwitz, 203 P.2d 513, 521 (1949).

This undeniable fact necessarily implies there can be no "true" nexus between "accurate clemency information" and the likely dispensation of grace. It has often been argued before this Court that there can be no meaningful way to predict a decisionmaker's exercise of discretion when it is unbridled. E.g. McCleskey v. Kemp, 481 U.S. 279 (1987). Thus, true knowledge of the "complete nature" of a governor's commutation power would not cause a jury concerned about preventing a defendant's potential return to society to be any less inclined to vote for the death penalty. California v. Ramos, 463 U.S. 992, 1011 (1983). True knowledge could easily have been viewed as harmful to McLain's defense.

Commutation decisions, as matters of grace and mercy, necessarily depend "not simply on objective factfinding, but also on purely subjective evaluations", Connecticut Board of Pardons v. Dumschat, 452 U.S. 458, 464 (1981), and "'have not traditionally been the business of courts'". Ohio Adult Parole Authority v.

Woodard, ___ U.S. at ___, 118 S. Ct. at 1247. This is because judicial review forces "'judges [to] see only with judicial eyes,'" Herrera v. Collins, 506 U.S. at 413, thereby preventing a judge's own "'intellectual, moral, and personal' perceptions" to enter the decision-making process. see, Callins. v. Collins, 510 U.S. 1141 (1994) (mem., Scalia, J.).

Executive officials, however, are not bound by such restrictions in the exercise of clemency review. Thus, while the law may not allow compassion or sympathy, for its own sake, to be judicially recognized, see, California v. Brown, 479 U.S. 538 (1987), it could be recognized by a governor in a commutation setting. See, e.g. People v. Danielly, 202 P.2d 18, 30 (1949). By the same token, while free-standing actual innocence claims may not be judicially cognizable, Herrera v. Collins, 506 U.S. 390, such claims could be recognized by a governor in a commutation setting to reduce an unparoleable capital murder conviction to a parolable murder conviction. See, e.g. Calderon v. Thompson, __ U.S. __, 118 S. Ct. 1489, 1497 (1998) (referencing clemency decision of California Governor denying claim that new evidence established "actual innocence" of "capital murder" premised on rape.), see, App. to Brief for Criminal Justice Legal Foundation as Amicus Curiae, 1997 WL 590868. A jury's knowledge of such boundless authority could not cause it to be any less concerned about a defendant's potential return to society. Indeed, McLain's jury, which heard evidence suggesting McLain had been erroneously released on parole in the past, would not have been receptive to the evidentiary proffer it never heard that the governor's office had neither any set commutation policy nor any standards. Pet. at 5.

Adding the California Supreme Court to the equation does not alter the analysis. In California, the likely dispensation of mercy through commutation, even for twice-convicted felons, "cannot be quantified." People v. Carpenter, 935 P.2d at 733. As a "private" extra-judicial act, commutation review would allow Justices of the California Supreme Court to air their intellectual, moral, and personal perceptions that fell outside their judicial duties. Thus, while the California Supreme Court rarely issues reversals of capital judgments on appeal, see, Philip Hagar,

Counsel For The Condemned, 13-Dec Cal. Law. 33 (1993) (94% affirmance rate since 1990 reported), the court has stated that "recommendations [of commutations of life sentences without parole], at the invitation of a Governor, are rarely withheld." People v. Zimmerman, 680 P.2d 776, 779 n.3 (1984). A governor's "invitation" would never be a proper factor in the disposition of a criminal proceeding in the California Supreme Court, but the court nevertheless considers it an important commutation factor.

If commutation review, by its very nature, is an extra-judicial discretionary function, even for the California Supreme Court, then, "how the jury's knowledge of [commutation] availability will affect the decision whether or not to impose the death penalty is speculative." Simmons v. South Carolina, 512 U.S. at 168. In other words, advising McLain's jury of the tiered commutation procedure involving the California Supreme Court would not have imparted any information that was truly indicative of McLain's likely commutation.[4]

McLain attempts to minimize the importance of the questions presented in this case by asserting that there is no apparent conflict with other circuits or any decision of this court. There are easy answers to this challenge. First, no other circuit has ever held that capital defendants have a constitutional right to accurate clemency information. This fact suggests that the rule is aberrational and worthy of this Court's attention. The Court has before reached out to take these kind of aberrational rules. E.g. Calderon v. Thompson, ___ U.S. ___, 118 S. Ct. 1489 (1998); Calderon v. Ashmus, ___ U.S. __, 118 S. Ct. 1694 (1998). Second, McLain, like the Ninth Circuit, fails to see that this Court has "never questioned the power of States" to enforce "rules that themselves serve the interest of fairness and reliability -- even if

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4. If the jury knew of the true nature of clemency review, it might also feel less responsible for its decision, which is exactly one reason why California juries are told little, if anything, about clemency review. People v. Ramos, 689 P.2d 430, 443 (1984). Ironically, such diminished responsibility would have been lawful under the Federal Constitution. Romano v. Oklahoma, 512 U.S. at 14 (O' Connor, J., conc.).

the defendant would prefer" otherwise. Crane v. Kentucky, 476 U.S. 683, 690 (1986). The Hamilton rule infringes upon this paramount sovereign power, and this Court must vindicate for all States this federalism principle through certiorari review.

CONCLUSION

For the foregoing reasons, the warden respectfully requests that the Court grant the petition for writ of certiorari to review the Ninth Circuit United States Court of Appeals decision in this case.

Dated: August 24, 1998.

Respectfully submitted,

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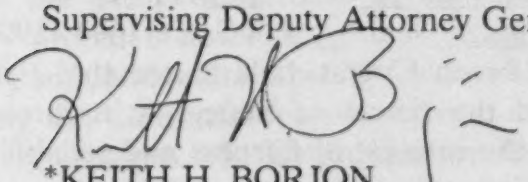

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SUPPLEMENTAL APPENDIX A

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff-Respondent, vs. ROBERT CRUZ McLAIN, Defendant-Appellant.	)	No. _____

APPEAL FROM THE SUPERIOR COURT OF VENTURA COUNTY

HONORABLE LAWRENCE STORCH, JUDGE PRESIDING

REPORTER'S TRANSCRIPT ON APPEAL

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ARLENE S. STONE, CSR 3012

SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF VENTURA

THE PEOPLE OF THE STATE OF CALIFORNIA,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	No. CR15344
	)	
ROBERT CRUZ McLAIN,	)	
	)	
Defendant.	)	
	)	

REPORTER'S TRANSCRIPT ON APPEAL

Thursday, April 9, 1981

APPEARANCES:

For the People: PETER KOSSORIS
Deputy District Attorney

For the defendant: STEVEN P. PELL, ESQ.

-and-

GEORGE ESKIN, ESQ.

ARLENE S. STONE, CSR No. 3012

VENTURA, CALIFORNIA; THURSDAY, APRIL 9, 1981; A.M. SESSION

- - -

THE COURT: Record will show we are outside the presence of the jury; counsel and defendant are present.

I would, for the record, at this time order that the order for daily transcript is at this time terminated. I would like at this time to state for the record the instructions to be given by the Court, the Court will instruct as follows: CALJIC 8.84, CALJIC 8.84.1, as modified, a Court special instruction on the limited purpose for which evidence has been received, People's requested instruction designated at No. 2, pertaining to the proof of other crimes, for which the defendant was not tried and is alleged to have committed, a Court's special instruction on proof of prior felony convictions, plaintiff's requested instruction No. 1, which has been modified by the Court, which contains the language of 190.3 with respects to the gubernatorial power to pardon or commute as well as the Morse instruction with some modification by the Court, CALJIC 17.31, CALJIC 17.45 -- 17.31 and 17.45 have modifications, making reference to the earlier set of instructions given at the conclusion of the guilt phase, and the concluding instructions, 8.84.2.

Are there any additional instructions that at this time are requested by either side?

MR. KOSSORIS: I don't believe so.

MR. PELL: No.

THE COURT: All right. That being the case, we are ready to proceed. We will have the jury come in.

(The following proceedings were held in open court, within the hearing and presence of

the jury:)

THE COURT: Record will show at this time the presence of the members of the jury.

Ladies and gentlemen of the jury, we come to that part of this penalty trial where counsel are afforded the opportunity to address you and again, it is what is known as argument, or summation.

The procedure is just a bit different with respect to the order of argument and the amount of arguments each side has. In this phase, each side is permitted to address you twice. The People will open, followed by Mr. Eskin, People will address you once again, and then Mr. Pell will conclude the argument.

You must keep in mind that you have heard all the evidence, and so counsel's argument is not in any way to be considered as evidence. Counsel are again afforded an opportunity to comment on the evidence and tell you how they see the evidence and apply it to the law. Counsel will undoubtedly be making reference to evidence that was introduced and received during -- not only the penalty phase but perhaps the guilt phase as well.

And again, should your recollection differ from that of counsel's recollection, it is your collective recollection that controls and not counsel's recollection as to what the evidence is.

At this time you will hear the opening argument on behalf of the People by Mr. Kossoris.

MR. KOSSORIS: This is my opportunity to make an opening argument; and as you already know, I'm going to be discussing with you why, on the basis of this evidence, I feel you ought to vote to return a death sentence.

The Court will later be giving you instructions that pertain to the penalty trial, and you will find that the Court will give you a list of factors to consider, a chart listing those factors that I'm going to

put up on the board and display to you a little later in my argument as I discuss each one of them.

But the standard that you will be told to go by is to weigh and consider circumstances in aggravation and circumstances in mitigation, and that if you decide that the aggravating circumstances outweigh the mitigating circumstances, then you must return a verdict of death.

If you decide that the extenuating factors outweigh the factors in aggravation, then you are to return a verdict of life without possibility of parole.

So, it isn't just something where you go in and say, "Well, how do I feel about all this?" or, "What would I like to do?" You have got to go down as to each of the factors and consider them, weigh them, and determine whether the -- which has the greater weight, the aggravating circumstances or the mitigating circumstances, assuming that you find some of each exists.

Now, I think it's obviously not just a question of figuring out the number, although that would be a factor, also, because obviously there could be an aggravating factor on one hand and mitigating factor on the other, and they wouldn't necessarily be entitled to equal weight. And just for example, the fact that the defendant was convicted of another murder or has committed rapes in the past, as the evidence shows, I would think would certainly be entitled to a lot greater weight than the fact that he may have -- if you believ[e] the testimony of his brother -- stopped to help somebody fix a flat tire once. You don't get a free murder and free rape if you stop to fix a flat tire.

You must go by the evidence that you heard, and in that connection, as you already know, statements of counsel are not evidence. Mr. Pell in his opening statement, for example, gave a list of evidence and much of that evidence was not produced before

you, and you are not entitled to consider the statement of counsel as having been evidence that you have seen and heard and that has been received both in the guilt phase trial and in this trial.

Now, obviously, you have got a very important responsibility; deciding whether somebody should live or die, I don't think anybody would question, is one of the most serious, if not the most responsible things anyone would have to undertake.

It's difficult to think of any more serious one, but possibly if the President had decided whether to start a nuclear war or something like that, that's one of the few things that probably would be even more serious. But you all agreed to undertake this responsibility; you are all obligated to make a decision based on the evidence and the law.

You also said, for instance, that you would be willing to consider capital punishment, depending on the facts before you and the law that you receive, and the People certainly expect that each and every one of you will fulfill your responsibilities and no one of you will say, "well, I just don't want to consider a death sentence because that's too tough a thing to decide, and I will vote -- I will vote for life," simply because that's the easier decision. I don't think any of you would do that, and I certainly would expect that each of you would follow the law and would be guided by the evidence.

Now, in my opening argument, which I expect to take somewhere between two and three hours and to finish somewhere before lunch, I will give you a little outline of what I'm going to do.

First of all, I'm going to review the evidence and the witnesses that were put before you in the penalty trial and probably start with the defense witnesses and then to go over the evidence put forth by the prosecution. After that I'm going to go through the

chart which gives a list of the aggravating and mitigating factors.

I would like to briefly right now show you what they are so as we are discussing the evidence, you can see how it may possibly relate to this case.

I believe the Court will instruct you at the conclusion of all this that these are the factors to consider, and as I say, later I'm going to discuss how each of them relate to this case. But as you can see, the factors include the circumstances of the crime for which the defendant was convicted, the presence or absence of prior felony convictions, whether or not the defendant acted under the influence of extreme mental or emotional disturbance, whether the victim was a participant or consented to the homicidal act, whether the defendant reasonably believed there was moral justification or extenuation for his conduct, whether the defendant acted under extreme duress or the substantial domination of another person, whether the defendant's capacity to appreciate the criminality of his conduct or conform to the law was impaired as a result of mental disease, defect, or intoxication, the defendant's age, whether he was an accomplice whose participation was relatively minor, any other extenuating circumstances.

And in addition, one other things the Court will tell you is that you can consider evidence relating to the defendant's background, history, character, or mental or physical condition, and I am going to go through the evidence and then later try to relate it to each of these factors.

Now, in this penalty trial, of course, I think it's obvious that what each side tried to do is the prosecution offered evidence with respect to aggravating factors, and the defense offered evidence with respect to mitigating factors. That is, we tried to put on the most aggravating factors we could produce, and the defense tried to put on the most mitigating factors, the best

things they could put in to say good things about the defendant.

I would suggest to you it's a real comment on the defendant's life and his character when one of the mitigating factors is that he once took a girl out on a date and he didn't assault her. ***Isn't that a comment about somebody, when one of the very best things that you can think of to say about them is that they once had a date with a girl and they didn't assault her?***

How would any of you feel, particularly men, if, when somebody was trying to sum up the very best things to say about you in your life, one of them was, "Well, he once had a date and he didn't criminally assault the girl"? Isn't that a comment on what a vile, reprehensible life the defendant has led, that the defense felt that was one of the things that they wanted to put forth as a factor in mitigation?

And what did the defendant's own psychologist say about him? I would like to start a little by talking about Dr. Evans. Dr. Evans was the defense psychologist. I am sure you remember him since he testified just a couple of days ago, and he seemed like a pleasant fellow. I think a lot of what he said is just common sense, but what did he really say about the defendant, particularly when -- after the defense brought out in his direct, the best things he could say, that they thought might help the defendant -- when I brought out the rest of the things in his notes that hadn't been brought out on direct examination and he described the defendant as a person who was cruel, sadistic, lying, manipulative, aggressive, felt the world owes him a living --

MR. PELL: I would object on the cruelty; misstatement of evidence.

MR. KOSSORIS: I will be happy to cite the Court to the page number.

THE COURT: The jurors' recollection will

control with respect to that matter. I have no specific recollection at this time.

Please proceed. Objection is overruled.

MR. KOSSORIS: A person who easily gets angry and has led essentially a life where he's committed crimes, he's committed cruel acts, he's committed aggressive acts, and that's what the defense psychologist has to say about the defendant.

And of course, the reason they called him is because his explanation is sort of the bottom of the barrel defense, when you don't have anything else going for you, and you know what it is now, he led a deprived childhood, so it either isn't his fault or at least it's partly excused.

Now, I think when you have to resort to that explanation, that ought to tell you something. We hear that a lot these days in society: Somebody does something bad and, well, it's not his fault. He's from a deprived background. ***Seems to me when you are dealing with a man 41 years old who's been in and out of prison, who's had probation officers, who's seen psychiatrists, who has had plenty of changes to reform, that at some point his conduct ought to be his own individual responsibility.***

And you know, Dr. Evans, I thought for the most part he was a pretty good witness, but I think where he really kind of fell down is when on redirect he overextended himself, and he apparently wasn't completely sure about what he was saying, so he said, well, [ ]any other psychologist would tell you the same thing. I've talked to other psychologists and I think that shows you he wasn't completely sure about the statements that he was making, blaming this all on the defendant's background; that he had to make some vague general reference to the fact that other psychologists would say the same thing.

Well, who knows what they would say? We heard one; that's what he said. He tried to say,

well, this type of background would produce this in anyone. He didn't cite a single study for that conclusion, and I think he was really kind of lucky in -- reaching in saying that.

A lot of the other things he said were just common sense. He says when a person doesn't come from a good home, doesn't get a lot of love as a child, will have bad effects on him. I think that's common knowledge, but I don't think anyone has brought any study, shown before you that if you raise five kids in a home where they don't get adequate amount of supervision and love, that they are all going to turn out to be rapists, child molesters, burglars, et cetera.

Now, that's what Dr. Evans had to say about the defendant, and ***it seems to me he described a person of very few real virtues. His whole pitch was it's because of his childhood that he's turned out so bad.***

And who are some of the other defense witnesses that we heard? Well, we heard the defendant's ex-wife and Judy Newfield, some sort of a weak alibi about the '71 case -- and speaking of that, a little bit, and the Solano case, it seems to me the defendant's been convicted of those cases; he obviously had adequate opportunity to put forth whatever he wanted to put forth at those times, and I think you should regard his guilt of those offenses for which he was convicted as having been settled, and the issue now is what are the aggravating or, if they exist, extenuating factors about those cases.

I don't think that 10 years from now somebody ought to be quarreling with your decision, whether you were right or wrong. And when you have a person like the defendant who has the gall to get up and tell you, "Well, I was innocent in '71; I was innocent in Solano; I'm innocent here," and then you find out, as I think you already knew, that he's an anti-social personality, and anti-social personality's one of

the main features of that description, is they are lying, manipulators; they have been lying ever since they were a kid; they are used to lying, little or no conscience or remorse. It's pretty easy for a guy like that to get up and lie with a straight face.

And you have seen him do it. You saw him do it in the guilt phase. You saw him do it in the penalty phase, over and over and over again.

Now, we had, as I say, some sort of a weak alibi put on by the defendant's ex-wife and Judy Neufeld. I think about all that tells you is despite the fact that his ex-wife was wronged by the defendant, he himself told the psychologist and admitted he married her even though he didn't love her, just to get the law off his back -- kind of another example of his cruelty and disdain for the feelings of other people -- despite the fact that she's divorced him and remarried, she was willing to come in and do one last favor for him.

And you have, ironically, his story about that night is completely the opposite of hers. She and Judy Neufeld would like you to believe he was home and then he left and they came home around 10:10 or whatever and he was there. And I suppose they would like you to believe he couldn't have committed the rape since he got home on time.

Of course, they switched the times around from even 10 years ago, and his story was he's down in Los Angeles all day and just got back, and first place he went was Jeannie Duggar's, and that was around midnight.

So his story isn't [ ]consistent with theirs. Another interesting little thing is this big fuss about the jacket. Some of the defense witnesses would have you believe that that jacket was blue, and the girls described it as green; and, therefore, they must be wrong and it's not the defendant.

Well, that was kind of a specious issue to

begin with. Who would expect them to note the exact color under those circumstances. But then we dragged out the jacket. Fortunately it was still around in the Court's possession after 10 years, and you can decide what color you think it is; but I would suggest to you if you saw that jacket, you would be just as likely, if not more so, to describe it as green than blue. So it does turn out it looks greenish, and you can imagine how it would look at night, for instance, in a cemetery, against a background of green grass and green trees.

And then we had Mr. Chatman, the defendant's friend from prison -- although he described himself as a friend and the defendant said he wasn't a friend, he was an acquaintance -- because the defendant said he doesn't really trust anyone.

And Mr. Chatman claims that he wrote up this deposition, the one that's supposedly the defendant was going to get Jodi Whitman to sign. But there are a few things wrong with that. It's obvious Mr. Chatman -- I think he described himself as a jailhouse lawyer, and although he denies it, it's obvious he resents authority and likes to do whatever he can to help any inmate in their struggles against authorities.

And Mr. Chatman said, when asked what was in the deposition, "All I can give you is a brief description." So then I said, "Give us a brief description. Tell us the gist of what was in the affidavit."

And he said, quote, "I can't even begin to describe it."

Well, you know he never wrote any affidavit, and it's obvious what happened. John Gerber went to see him. Mr. Chatman admitted he was interviewed by Gerber, and Mr. McLain said he had written up this deposition, even though McLain himself, when he testified in the guilt phase trial, said it was somebody else, somebody who had gotten out of prison

and went to work for a law firm and then overdosed.

The defendant had described it as being somebody else. So obviously what happened, they shopped around, found somebody who was willing to come in and lie, but they didn't get his story straight enough, so he was able to describe any of the contents.

MR. PELL: I would object. That's improper argument.

THE COURT: Objection is sustained.

MR. KOSSORIS: I would like to be heard on that, your Honor.

THE COURT: Please proceed.

MR. KOSSORIS: It's obvious Mr. Chatman's testimony was false; it's obvious that what little he did know was attained by his own admissions from his conversations with John Gerber and was totally inconsistent with what he[,] defendant[,] said in the guilt phase.

And Mr. Chatman, of course, was a fellow who -- when my investigator interviewed him, he didn't mention that, refused to talk partly through the interview, and obviously somebody who wants to do what he can to help the defendant. He said he's got a lot more years to serve in prison himself, so he has nothing to lose by coming in here and lying.

Then we heard the defendant's sister. And I think it's to her credit that she's willing to come in here and say whatever she can without really lying, to try to help her brother. I think you would expect any sister to do what she can. And her testimony was essentially limited to that the defendant had a tough childhood, which nobody disputes, but a lot of people have had tough childhoods and don't turn out to be murderers, robbers, rapists, and child molesters, and that the defendant took care of his mother.

And she said that from at least the time he was 12, that the defendant was in and out of custody

for various things that apparently the authorities were arresting him for. So he's a person who's had a lot of brushes with the law, and he's a person who has a lot of resentment against authority and who, by his own statement later on, ***I think he described himself as somebody who doesn't bend over for the law, like most people do. And he said that almost, if you recall that in his testimony -- he said that almost as though he was proud of it, as though he was proud of the fact that while most people follow the law, he doesn't, and he does what he damn well pleases. That's the type of attitude he has.***

In talking about the defendant's testimony, everything he says is contradicted by other witnesses. You have heard him testify to things that have been contradicted by Terry Beebe, Zolano Hockett, Eddie DePhillipes, Lloyd Ketcherside, Sherry Younger, Lisa Donaldson, Jodi Whitman, Alba Brandon, Francis Salerno, Jeannie Duggar, Ralph Cermino, Dave Williams, Andrea Carr, and the list goes on and on.

At some point it certainly becomes obvious that the defendant lies over and over and over again; that it doesn't bother him in the least to lie; that he says whatever he thinks will help him.

And it's easy for him to lie with a straight face because he's been doing it all his life and because that's his own psychologist who tells you he's been an anti-social personality for decades, and one of the characteristics of anti-social personalities is the lack of conscience, the lack of remorse; they lie, they get experienced at lying, and it doesn't bother them to lie.

And another interesting think about the defendant's testimony: When I asked him about some of the statements to David Hicks and Todd Forbes, I asked him if he stated that the rest room at the church would be a good place to commit rape, and he said no, and then he added "because the rest room is too small anyhow."

But there's a man who obviously, by his own statement, has some expertise in the area. And ***didn't that statement show you that he's a person who's thought about where the best place to commit a rape would be and what would be the ideal place to commit it?***

And the defendant, when he testified, made the ridiculous assertion that when he escaped, a police officer had given him the key. And I asked him who the officer was, because obviously, we would like to go out and interview him and bring in whoever the defendant claimed had done such a thing and get his version. And the defendant simply refused to answer. The Court ordered him to answer. He still refused to answer.

And he made the statement, "You can't do nothing to me for refusing to answer." Again, just an example of the fact that he's defiant, that he feels -- he takes pride in the fact that he doesn't follow the law like most people do, most of the time.

But, of course, the main reason that he wouldn't answer is obvious. He lied; that assertion was obviously ridiculous and not true. You know no police officer gave him the key. Obviously an officer who did that would be subject to rather harsh disciplinary measures. ***So the defendant made up a story because he always likes to blame things on other people;*** and when called on it, he simply refused to answer because there was no name he could give. He knew that any name he could make up, we would go out and talk to that guy and bring him in to testify, and he would refute the defendant's statement.

What other reasonable explanation is there for the defendant having made such a ridiculous assertion and then refused to answer a question that was pertinent and that he was ordered to answer? ***It was just another example of how he lies over and over and over again, and how he does it without a trace of remorse,***

without a tinge of conscience when he does it.

Now, talking just a little bit about some of the rest of the defense evidence, we heard Jackie Smith, again, hardly someone you would call a credible witness, and again, she tried to blame everything on Lloyd and Teddie, but you heard her tape in the guilt phase. You heard more portions that related to the Solano incidents here. You didn't actually hear them, but you heard portions from the transcript read that were pertinent, and you heard how, again and again and again, what she said here in court was contradicted by what she told Bob Hind, because apparently her desire to blame it on the boys and try to get Bob off was something that developed after the arrest, for whatever reason.

And during the period after the arrest and the time when she began testifying, she changed her story on one point after another -- made up things to try to blame it on Lloyd and Teddie, retracted anything she said that was harmful to Bob

It would be difficult to see how anyone could give her testimony an ounce of credibility after hearing her testimony, after having observed her attitude and her demeanor, and after having seen over and over and over again the inconsistencies between what she said in court and what she told Bob Hind at the time.

Now, the other defense witnesses, we had Helen Lenoard on the stand who said -- whose recollection seems rather vague, but she said she didn't have any report that she had written to refresh her recollection, but she said the defendant seemed cooperative but kind of intense, and he was neat and clean.

And there's some work records that -- I don't think they have been read yet, but that say some favorable things about the defendant.

And then on the other hand, there are

prison records that were read yesterday which are quite recent, 1978 and '79, that say the opposite, although they are not 100 percent negative either.

Now, obviously, you can go through a long list of prison records, such as a person who's been incarcerated this long would have accumulated, and pull out a few strands that are favorable, but I think, in summation, it's apparent that the defendant was far from a model prisoner. He had some illegal homemade knives in his cell; he was convicted of that. Some people rated him as an above-average worker; ***other times he was rated unsatisfactory in his attitude and work habits. He didn't participate in self-help programs, and he was described in the personality evaluation in 1978 as hostile, guarded, defensive, negative, suspicious, and defiant.***

Now, isn't that pretty much what you would expect? That's really pretty much consistent with the personality profile that Dr. Evans gave you as a defense witness, and it's certainly consistent, I think, with what you come to see and know about the defendant from having heard him testify and heard evidence about him in the last few months.

Now, we had a number of police officers the defense called -- still not clear to me what the purpose of their testimony was. They talked about what they did in the 1971 case, but I suppose to try to get you to second-guess whether the defendant should have been or should not have been convicted in 1971.

And again, I would suggest the issue of his guilt or innocence in any of the cases for which he's been convicted ought to be a settled issue. You have seen yourself the protections the defendant is entitled to and has -- he has attorneys defending him; the rules of evidence are provided to both sides; he can't be convicted unless the jury is convinced unanimously beyond a reasonable doubt of his guilt. And I think to

regard the issues of his prior convictions as having been settled is the way it should be, and the issue is now were there aggravated circumstances associated with those crimes or extenuating circumstances or what, especially since not all witnesses are available or still remember things and, consequently, the evidence isn't quite as clear 10 years later as it was then.

But having heard some of the witnesses, for instance, from the 1971 case, I think just on the basis of what you hard, ***it's crystal clear, particularly with what else you know now about the defendant that might not be relevant to the guilt phase but what you know about his character, his background, his prior record, and his personality, it's crystal clear the defendant committed those offenses.***

So let's talk now about what he did in 1971, because, fortunately, the victims are still available, and they have a recollection, and you would expect them to have a recollection.

Now, we are talking about two girls that were 11 years old when this happened to them, and they go swimming together. They are walking home at night together. They walk through a cemetery park at night, and the defendant is following them and he has a gun, and you know what happened to them. He told them that he had a gun. He made them go over by the tree. He made them undress. He fondled them. He raped them. He forced Lisa to orally copulate him. And when the girls told him it hurt -- and you can imagine the pain they must have experienced, both physically and mentally, to be raped and molested at that age, under these circumstances -- ***and when Lisa told him it hurt, what did he say? He said, "I know." He was just as cruel then as he is now.***

And he raped Jodi. She said, "I hurt. It hurts."

And the defendant said, "I know it does." He

didn't give a darn. As Dr. Evans admitted on cross-examination, he is a person capable of cruelty; he is a person who thinks that other people exist to satisfy his own desires.

But was that enough? He told the girls after it was all over that he was going to follow them home and that if they told anybody, he'd kill them.

Now, I think most of us would think that he didn't mean that, that he was just trying to scare them into not telling, that he probably would want to stay away from them and not get caught again.

But we know now that that isn't the case. They did tell on him. The case went to trial. The defendant was convicted; he was sent to state prison. He himself admitted that he was talking about revenge on various people connected with the case, including Jodi Whitman.

Of course, he claims that at some point he changed his mind and decided to go the deposition route instead. But he not only talked of revenge; he somehow managed to keep track of Jodi because when he did come back to rape her and kill her again in 1979, he even knew who one of her ex-boyfriends was from junior high school.

As you will recall, Theodore Willis at the door asked Mrs. Whitman if she had married Jeff Nelson. Now, how possibly could Theodore Willis have known that unless the defendant had kept track of Jodi and had provided him with that name?

He was obviously planning this crime for years. So it wasn't enough that he had raped and molested Jodi and Lisa when they were 11; he had to come back to do it again -- at least to Jodi. If that isn't about as aggravating an aggravating circumstance as you can have, what would be? What worse trauma could be inflicted on Jodi and her parents, because you can imagine what they have gone through, having this done

all over again, than what the defendant did inflict.

To say that he's capable of cruelty has to be the understatement of the year. If the death penalty wasn't made for acts like this, for persons like this, then who would deserve it? What would deserve it?

So just by the grace of good fortune, or whatever, Jodi wasn't home when Willis, Ketcherside, and McLain went to her apartment. Otherwise, she'd be buried in some grave instead of Joni Kelley, and instead, Joni Kelley got it.

And, of course, we know that this act in the cemetery of rape, child molest, this isn't something that the defendant just did on a momentary impulse because if he did, that certainly wouldn't be an excusing factor, but it might be argued to be somewhat of an extenuating factor.

He had been talking about rape; he had been planning rape. He told David Hicks -- he suggested he accompany him to Santa Barbara to commit a rape and told Hicks that would be a good place to commit a rape because there's a lot of women walking around on dark streets.

And he told Todd Forbes that he was going to commit a rape and he was going to do it one of these days, and he talked about where a good place to do it would be; he talked about the church, where he tried to rape and molest Sherry Younger, and he mentioned that the rest room would be a good place to do it.

And he was thinking about not only how to do it, but he was thinking about how to do it and not get caught, because he also had his dark sunglasses, and he talked about how that makes it more difficult to remember what a person looked like around the eyes. He wore tennis shoes because, as he explained, they are quieter and more difficult to detect.

So he was not only thinking about

committing these vile acts; he was thinking about committing them and getting away with them and not getting caught so presumably he could commit some more.

So he tried to rape and molest Sherry Younger. He hotched that up, partly because she happened to live near -- nearby where he tried to commit the rape and her brother was with her and ran home and partly because -- I would suggest that she had exceptional poise and resourcefulness for a 12-year-old and stalled him off with this rather ingenious story about catching the rabbit and then we will talk about it, which probably threw him for a loop, and he didn't know immediately how to react to that.

And so having failed in his objectives on July 22nd, he then succeeded on August 12, 1979. And of course, again, we are dealing with a location that he had spotted, had been to with Todd and David, was well acquainted with and one that was perhaps better suited for his criminal desires and objectives because it was a park; it was dark. [T]here wasn't as much light. There weren't as likely to be people around.

So he learned something from his own unsuccessful attempts on the 22nd and picked a better spot for August 12th. It's hard to think of a single extenuating or mitigating factor about the episodes in the summer of 1971. It's hard to imagine a more aggravated case, even if you didn't know about his attempts to do it again eight years later.

Now, has the defendant at any time learned anything that you would like him to learn from all this? Is he really sorry for what he's done in the past? Because, although you are not to base your decision on a prediction of what he would do in the future, I think certainly a factor is his character and mental state and what is his mental state? Well, I think he laid it out pretty well in the letter to Mary Rich.

He said, "I tried to do good while I was out

there," although how you square that with his conduct is beyond belief. But then he said, "But the next time I get out, I will not try to do right." He doesn't have the slightest remorse or conscience for anything he's done, and his statement on what he would like to do is that he'd like to do worse -- he would like to do more than what he did the last time. That's his feeling.

Maybe he did help take care of his mother once; but whether or not he did or how much he really did of that, ***it's obvious that however many problems and character flaws he had years ago, he's done nothing but get worse. He certainly hasn't improved with age.*** And he has the gall to say, for instance, about Todd Forbes, "Well, I ran around with him because his mother asked me to and she was afraid that he was becoming a homosexual."

Now, that was just another example of an outright lie and fabrication. His mother came in -- I think you will agree that she was a completely credible witness. She absolutely denied it. And not just for words; if you watched her when she denied it, you can see that she was rather outraged at that suggestion and -- you know, Todd, he's married; he's got a couple of kids now.

The defendant just lies at the bat of an eyelash. What he says has no relationship whatever to the truth.

There's lots of other evidence about the defendant's mental state, character and so forth. We had an interesting conversation with Dave Williams, part of which the defendant denies, part of which he admits, and you know David Williams isn't going to make anything up like that, ***and the defendant blames his transgressions since he got out***, and the fact that he claims the police chief up there was also suspecting him, so he said, "Well, as long as he's going to suspect me, I might as well go out and do it."

And Dave Williams said, "If you had such a miserable life, why don't you just shoot yourself?"

And he said, "That would be the easy way to do it, and if I -- before I would do that, I would want to take a police officer with me."

It's hard to think of a thought that the defendant has that doesn't have some basis in vile motive and desire associated with it. And he says -- well, Dave Williams said, "Well, if a police officer pulled you over, would you just automatically shoot him?"

And he said, "Well, no, but if I was coming back from a robbery or burglary, then I would." He -- without batting an eyelash -- would shoot or kill anyone if he felt like doing it or had any incentive to do it.

So he was saying, "Well, I wouldn't do it if there's no reason to -- and I presume partly because he would have some concern about if he just shot a police officer for no reason, about getting caught for that; but if he had some reason to, he just committed a burglary, sure, then he would kill him.

And he informed Ralph Cermino rather casually, "The next time I escape it's not going to be nonviolent." And we know that the defendant has a history of successful escapes. He escaped in 1971, as you heard from Russ Noregon; ***and of course, commensurate with his pattern of blaming everything on somebody else, he informed Noregon that, "Well, I'm only doing this because this other guy made me do it and they would kill me if I didn't," because he doesn't want to take any responsibility for himself.***

Then, of course, we find out, just a short time before, he had shown an escape note to David Hicks and asked David Hicks to bring up some hack saw blades so he could escape. So contrary to what he informs Noregon -- "I didn't ever have any intention of escaping. These guys are making me do it" -- he was

planning an escape and had enlisted Hick's aid in the escape before this ever happened.

And as you know, he escaped in January of this year, and he told Cermino that he was going to do it again, only next time it won't be nonviolent. ***His whole attitude is one of violence, committing crimes, committing crimes whenever it suits his purposes, lying without batting an eyelash, and a lack of remorse for anything that he does.***

He murders Joni Kelley, albeit not without some assistance. First she's raped; then she's murdered. And there are injuries all over her body. She's shot three times. There's blunt force injuries all over her body. He told Zolando Hockett he hit her with a wrench or wrenches. So she's beaten, she's shot, she's raped and left for dead.

And what does he do for an encore? Diane Bazzargani gets it. And what happens to her? She's stabbed in the chest, her throat is cut, and on top of that, the autopsy surgeon tells you, it's the most severe strangulation he has ever seen in his career, and he's autopsied several dozen strangulations.

So the defendant doesn't just commit these crimes; he commits them on a grand scale. Maybe that somehow fits in with Dr. Evans' profile of him as a person who likes to seem important and likes to do big things and likes to have a sense of self-importance, and he proves it by committing the most cruel aggravated crimes he can conjure up, and he's pretty good at conjuring them up, I imagine.

So let's look at the factors that you are supposed to consider. The circumstances of the crime: Now, obviously, the crime for which he's been convicted by you, attempted murder, rape, and murder, there's nothing nice about that, and there's no murder or rape or attempted murder that you would say is a plus for somebody. I suppose we could all concede that if we

did a scale of murders, some are very aggravated and some may have extenuating circumstances.

For example, a guy comes home, finds that somebody raped and murdered his wife and children, and he figures out who it is, goes out and purchases a gun, tracks them down and kills them. Under the law, that would presumably be first degree murder. And yet, I think we would all agree that that would be a murder with a lot of extenuating circumstances.

I don't think you could think of a single extenuating circumstance about the crimes that the defendant was convicted of in this case, because what is involved, murder, infliction of numerous injuries, revenge, two crimes within a space of about a day -- there's not a single justification or extenuating factor for the crimes.

I think you have to consider the pain and suffering that the victims must have gone through, both the ones that were killed and the ones that weren't, because, remember, the autopsy surgeon said that Joni Kelley was alive when she received the injuries. And I think it's reasonable to believe that the blunt force injuries all over her body were inflicted to force her to submit to the rape. And then after the rape, they killed her. And you may recall that Lloyd Ketcherside testified that Teddie Willis said that he hated to shoot her, and the defendant said it had to be done.

Zolando Hockett testified that the defendant explained to him that they each shot her once -- to bond them together in crime. What could be more aggravated than that?

The stealth and deception to try track down Jodi, sending the two teenagers up to the door and having Teddie Willis give a false story while the defendant lurked in the car. A second factor is the presence or absence of criminal activity involving the

actual or threat o[f] use force or violence.

Well, we know about the force and violence used in this case, the numerous injuries inflicted, the injuries inflicted on Diane Bazzargani, the prior convictions involving robbery, kidnapping, child molest, the threat to kill Jodi and Lisa if they told, a threat that the defendant obviously meant every word of.

The presence or absence of any prior felony conviction: We're not dealing with first time offender here. Anything but. His felony convictions started in 1960, with a child molest; in 1962, burglary, kidnapping, robbery; in 1971, two rapes, two child molests, oral copulation, attempted rape, attempted child molest; and now besides the crimes you convicted him of, murder in Solano County, murder in Solano County, and personal use of the knife by the defendant, the use of his knife, the one that he asked Jackie Smith to hide, the one that was found under the mattress, and the one that Steve Scott found type O blood on, the blood type of the victim.

Whether or not the offense is committed while the defendant is under the influence of extreme mental or emotional disturbance: Obvious that he wasn't. This isn't a case of a guy on some temporary psychotic state, of somebody who came home and found that his family had been assaulted and went berserk and killed somebody. This is a case of a revenge crime, one the defendant had plotted for eight years, and then when he couldn't find the victim home, taking it out on another woman.

Now, sure, Dr. Evans said he has some personality disorders. Well, who the heck in life doesn't have some personality disorders? But he isn't psychotic, and as Dr. Evans conceded, people can have personality disorders and live a life free from crime, get married, have a family, hold a job.

But Dr. Evans himself said, "It would be very unlikely you could find a rapist and a child molester who didn't have a personality disorder." Seems to me it's obvious, virtually by definition, anyone with the defendant's makeup, the defendant's background, who's been guilty of the vile conduct that the defendant has, has got a severe personality disorder, but can you imagine a psychologist or psychiatrist coming in and saying, "I analyzed this man with this background and he told me these things, and I don't think he has any personality disorders"? We would laugh him out of the courtroom.

Whether the victim was a participant or consented to the homicidal act: Well, obviously Jodi Whitman didn't participate, didn't consent. I hardly think it's going to be suggested that Joni Kelley consented to be murdered or raped. By definition, you can't rape a woman if she consents.

Whether the defendant reasonably believed there was moral justification or extenuation for his act: And notice that the word "reasonably" is in there -- anyone reasonably believed that there was moral justification for raping an 11-year-old girl -- keeping track of her and then coming back eight years later to rape her again and then kill her -- in that section is meant to be the type of example I gave you where somebody finds that somebody has assaulted his wife and/or children and then goes out and does something about it. It sure doesn't fit in this case.

Whether the defendant acted under extreme duress or the domination of another person: It's hard to conceive of what durress he was acting under. He came down here from Solano County just to commit the crimes against Jodi Whitman. Sure, we have this phony story about, well, he wanted to get a car loan and he wanted to move Andrea Carr, but you know she never wanted him to move her, never made

the request. He didn't come all the way down here to get a car loan. Probably figured this was a good place to apply for it because if he got one, he'd split and get out of town and they wouldn't be able to track him down for the payments. That would be kind of frosting on the cake. Commit the rape, the murder, and get a new car out of it.

And what about this issue of being under the substantial domination of another person? You can't conceive of Teddie Willis or Lloyd Ketcherside being the leader here. Now, that's not to say that Teddie and Lloyd are enemies. It's obvious they are not. It's obvious, I think, that they were attracted to the defendant, partly because he was an ex-con, undoubtedly boasted about it, like he did to Todd and David, and being -- having some experience committing crimes, it's obvious that Teddie and Lloyd are accomplished auto thieves now. I think it's obvious they were interested in coming under the defendant's wing and honing up their expertise in crime.

But I think it's also obvious they would look up to him; they would look up to somebody with a prison record like the defendant's.

And the trip down here was at the defendant's suggestion. It was the defendant who wanted to see Jodi Whitman, and Teddie and Lloyd came down and obviously thought it would be fun and maybe they would learn something, and the defendant was the one who had the expertise. He was the one calling the shots. He was the one who wanted to find Jodi Whitman.

Whether the defendant's capacity to appreciate the criminality of his conduct or to conform to the law was impaired as a result of mental disease, defect, or intoxication: Nobody suggested that he was drunk or on drugs. I would assume by mental disease, they mean something disabling, and this thing about an

anti-social personality is a personality disorder -- well, you can decide whether you think that's a mental disease.

The psychologist said, "Well, he's not under any delusions, not under any hallucinations. He has an average IQ. He knows who he is and where he is." His experience at lying, and by definition, a person who commits child molest and rapes is a person who is an anti-social personality or has a personality disorder. That's not what we mean by a mental disease, unless you call lack of conscience, lack of remorse, and extreme cruelty and viciousness a mental disease, and if you do, that would excuse anybody, because then anyone who commits these crimes has a mental disease.

The defendant's age: You know, I think it's fair to assume that the reason that factor is in there and what is meant by that is that other things being equal, the younger the person, the more extenuating the crime. That is, if somebody commits a crime like this when he's 20, there may be more hope for him than when he's 41. And maybe at that point it's a little more relevant to say, well, he had a deprived childhood, so maybe he deserves another chance, so I would suggest to you that the younger the person, the more his age is in his favor. ***The older he is and the more he's done and the more chances he's had and the more he's shown a disinclination to reform or change, the more the age factor counts against him.***

And we are dealing here with a guy who is 41, who's had lots of chances, who's had lots of opportunities, and whose attitude is, as he expressed in the letter, the next time out, if he would have had a next time out, he's not going to try to do right.

So that factor is certainly a minus for him.

Whether the defendant was an accomplice whose participation was relatively minor: He was anything but, and I've already talked about the fact that

it was the defendant who wanted to find Jodi Whitman. Lloyd and Teddie didn't really even know who she was except from what they could glean from the defendant's comments.

Or any other extenuating circumstances. I think you are going to have to think long and hard to try and conjure up any extenuating circumstances that might be considered to benefit Robert McLain at the age of 41, after what he's done, how he's done it, and what his attitudes are. There isn't a single factor on this list, A through K, that comes out in Bob McLain's favor. They all, individually and together, clearly show that the death penalty is warranted in this case.

And then there's the additional consideration about his character, his background, his history, his mental state, and that is the most damaging of all. I don't even know if all of you would have believed before you came into this case that there could be a human being so vile and reprehensible.

You probably thought of child molesting as kind of a disease that maybe a person does on impulse and maybe he's somewhat sorry and -- but in this case, you found out that isn't the situation. Maybe there was some good in him once. Maybe he did do some nice things for his mother. She's not here to tell us about that.

What is the appropriate penalty when you consider all of the extreme aggravating factors that you have in this case and the virtually total lack of any extenuating factors? It can only be a sentence of death.

What other appropriate penalty can there be, when you consider the law and the evidence, for someone who commits robberies, rapes, burglaries, kidnappings, child molestings, and then brags about it, is proud of it and says that if he could get out again, he wouldn't try to do right the next time? What is the appropriate penalty for somebody who plans to commit

a murder, plans where to do it, plans how to avoid detection, drives around with his sunglasses so he will always be prepared to commit a rape if the opportunity arises, and then viciously and cruely[sic] rapes and molests two 11-year-old girls, and when they tell him it hurts, he tells them, "I know it does," and then plans his revenge -- revenge for what? -- for the fact that they reported it and testified truthfully -- well, for him, I think he deserves revenge because he thinks everybody is here to serve his purposes, so he plans his revenge for eight years and comes back to inflict more trauma on Jodi Whitman and her family, but this time not only to rape her but to kill her, and then rapes and murders Joni Kelley -- beats her with a blunt force object and then a few days later kills Diane Bazzargari, stabs her, cuts her throat, and leaves her with the most severe strangulation the autopsy surgeon has ever seen.

It's inconceivable how you could fail to conclude in this case anything but that the aggravating circumstances far outweigh the mitigating circumstances. It's inconceivable how, if you followed the facts and the law, you could fail to return a verdict of death. And the prosecution asks that you consider the evidence, consider the evidence in the guilt phase, consider the evidence that you heard in the penalty phase, consider the instructions that the Court will give you, and ***even though it's not an easy thing to do, to sentence anyone to death, no matter how vile and reprehensible they are, in this case, it's deserved; it's required by the facts and the law, and I would ask that after hearing all the arguments and considering the instructions, that you return the only just and appropriate verdict in this case, and that is a verdict of death for Robert McLain.***

Thank you.

THE COURT: Ladies and gentlemen, we will take the morning recess. You are not to discuss the case among yourselves nor with any other persons, nor

form or express any opinions on it until it's submitted.

We will reconvene in 15 minutes.

(Recess.)

(The following proceedings were held in open court, outside the hearing and presence of the jury:)

THE COURT: We are on the record outside the presence of the jury at the request of defense counsel.

MR. PELL: Defense counsel makes a motion for mistrial based upon two improper statements: one, that the defense shopped around for John Gerber and somebody else to come in and lie. I think it's a direct violation of People versus Eich at 58 Cal. 2d, 70, a 1962 case.

In that case where they were dealing with something like counsel permitting somebody to lie -- they held that was not prejudicial, but this is much more serious than that in that we are allegedly shopping around for a perjurer, and I think it's totally improper.

The other is People versus Polk, 63 Ca. 2d, 443, in which the prosecution on the onset talks about the defendant getting a free ride unless the death penalty is imposed. And I think that was in conjunction with some comments that you don't give him a free ride, in relationship to his background, his character, his care for his mother, that doesn't entitle him to a free ride, and I think that in conjunction with the fact that Mr. McLain is already sentenced to life in prison without the possibility of parole and the jury has knowledge of that, makes it a violation of the statement in Polk, and it's improper; so I would move for a mistrial based upon both of those statements.

I think I misquoted that, in that -- I think he was talking about the free ride if Mr. McLain fixed a flat tire.

MR. KOSSORIS: I don't think Mr. Pell's

statements are an accurate version of what I said in the first place, and I suggest the Court order a daily.

THE COURT: Well, your suggestion is not going to be complied with with respect to the daily. There was reference to -- in your argument to the effect that they shopped around and got somebody who would lie, to which an objection was made and to which the Court sustained the objection.

MR. KOSSORIS: The testimony of the witness was that Mr. Gerber came to him; he was interviewed by Gerber; Mr. Gerber advised him what Mr. McLain was saying; Mr. Gerber advised him that Mr. McLain had written up there.

Mr. Gerber asked him if he remembered a woman's name in conjunction with such a deposition. They discussed what the relationship of the document was with Mr. McLain, and based on that, I think it's apparent that -- well, first of all, I think I'm certainly entitled to argue the witness lied, and I think he did lie.

THE COURT: You certainly are entitled to argue that a witness lied. There's no question about that. The problem with counsel's argument, from the Court's perception, and the reason why it was sustained was that there was some inference that counsel is deliberately offering perjured testimony.

MR. KOSSORIS: Well, I didn't mean that inference. And if the Court had permitted me to approach the bench, which the Court denied, we could have discussed it, and I would have corrected that inference, if indeed there was that inference.

What I did mean to suggest and what I do suggest is that the defense sent John Gerber or someone around to interview inmates and provided them with sufficient information so that it would be easy to find somebody who would corroborate the defendant's statement, and that the interviews were obviously sufficiently leading so it would be likely that at

some point an inmate would be willing to come in and lie, not that the defendant knew he was lying, but that the interview process was certainly conducive to finding somebody who would and did lie.

THE COURT: Well, I think that is legitimate. The problem is the manner in which it was put. The Court is not about to declare a mistrial. The Court would admonish the jury, should counsel request to have them admonished, to the jury -- and also, in the absence of any request for admonition by counsel, I would request of the prosecution that when counsel has an opportunity to once again address the jury, to make it abundantly clear to the jury that you do not in any way infer that defense counsel has in any way shopped around for any kind of perjury in this trial, or any lying by any witness.

MR. KOSSORIS: Well, if the subject of Mr. Chatman is covered in the defense argument, I will certainly return to it and make that statement.

In the absence of that, I don't know that I would plan to cover the comment again. If the Court wants me to, I would consider it.

THE COURT: Well, I think that -- depending upon how defense counsel wants to proceed -- if defense counsel wishes to proceed by way of admonition by the Court, the Court will comply with any admonition the Court deems to be appropriate.

MR. PELL: Is the Court suggesting that counsel draw up the admonition? I prefer it that way. Or if the Court wants to draw up an admonition --

THE COURT: I suggest you submit an admonition for me and I will review it.

On the other hand, if you would prefer that counsel for the prosecution dispell[sic] any thought by going into the area again, I will request of counsel to go handle it that way.

MR. PELL: I think the Court ought to

admonish.

MR. KOSSORIS: If there is going to be an admonishment, I think it should be in -- I think the Court should act on my request for admonishment on the opening statement and which is virtually conceded to have been improper.

THE COURT: The motion for mistrial on each ground stated is denied. The Court will consider any admonition by counsel with respect to the phrase utilized in opening statement to which the Court has made reference.

We will take the recess -- we have used up a good part of it already, and we will take another 10 minutes at this point.

(Recess.)

THE COURT: I note the presence of some visitors.

We are in the midst of arguing the case to the jury. If the visitors are to -- you are welcome to observe; however, you are to remain until the conclusion of argument, which may well take us well beyond the noon hour.

If that's satisfactory to the persons who are here, that's all right with the Court. But you are not going to be permitted to get up and leave in the middle of argument because it will be distracting to counsel.

Is that satisfactory with our visitors?

Before we bring in the jury, I will have the record show that I have the -- counsel for respective parties present, as the defendant is present.

The Court is going to admonish the jury upon the jury's return with respect to the comments made by the prosecutor in opening argument.

And it's my understanding the prosecutor will further go into the matter, as well, upon the resumption of argument.

MR. KOSSORIS: Correct, upon my next

argument.

THE COURT: That's correct. All right.

May I have the jury, please.

MR. KOSSORIS: I think the record should reflect we conferred with the instruction and agreed on it.

THE COURT: The record will so reflect. Is that correct, Mr. Pell?

MR. PELL: That is correct. My motion for mistrial having been denied, I'm requesting the instruction that will be given.

(The following proceedings were held in open court, within the hearing and presence of the jury:)

THE COURT: Record will show that the members of the jury are now present.

Ladies and gentlemen of the jury, in the prosecutor's opening argument, reference was made to a defense investigator shopping around to find the witness Chatman who would lie with respect to the preparation of a deposition pertaining to Jodi Whitman.

Such comments may have been subject to an inference that the defense countenanced and/or permitted testimony that was false.

You are admonished that no such inference was intended by the prosecution. You are further admonished that the defense has not in any way so conducted itself. You are the sole judges of the credibility of all witnesses who testify in this case. Counsel may argue to you the issue of the credibility of any witness.

Ladies and gentlemen, you will now hear opening argument on behalf of the defendant by Mr. Eskin.

MR. ESKIN: Thank you, your Honor.

May it please the Court, ladies and gentlemen of the jury, this is the first time in the trial,

from the commencement of the guilt phase to the commencement of the penalty phase, that I've had a chance to address you. I wasn't here when you were selected, so I haven't had that opportunity to find out some things about you and you didn't have that opportunity to find out some things about me.

In courtrooms throughout this Hall of Justice, every week of the year, perhaps even at this very moment, residents of Ventura County such as yourselves are subjected to questions by judges and attorneys during the jury selection process that we refer to as the voir dire, which translates roughly into "tell the truth." And I understand the process by which you were selected was thorough and exhaustive.

It is wise to reflect upon the questions that you were asked and the answers that you gave and the assurances that you provided, and the oath of responsibility which you affirmed at that time.

A question that's frequently asked of jurors by attorneys in nearly every criminal case is, "Are you prepared to accept the responsibility of sitting in judgment of another person?"

You will hear that question asked in petty theft cases, in drunk driving prosecutions, in sales of marijuana, and burglary cases. Some attorneys never ask that question on the theory that no one is likely to respond in the affirmative. It happens I was inclined to that point of view until in a drunk driving case a juror said, "Your Honor, I don't think I can assume responsibility I have undertaken."

The man's reluctance to sit in judgment in a drunk driving case is almost amusing.

In the context of deciding whether a man will live or die, the rendering of a verdict for petty theft or drunk driving or growing marijuana seems pretty mild. Of course, you understood from the beginning that it may become necessary for you to render this

ultimate of judgments, one which relatively few people in their lifetime are called upon to make.

But a majority of the voters in this state have conferred upon you the power to decide whether factors in aggravation outweigh factors in mitigation, and thus, you have the duty to decide whether Bob McLain will live or die.

I know it's unnecessary for me to remind you of the seriousness of your undertaking and your conscientious service has been in indication of your commitment to the task you have assumed.

I would question Mr. Kossoris's suggestion that there is anything in our lifetimes more serious than the decision you will make in this case. You probably didn't imagine that you would be placed in this position and chosen for such a task when you were notified to report for jury duty many months ago, but here you are and here we are, about to make the ultimate judgment of life or death.

Now, you and Judge Storch and the prosecutor and Mr. Pell and the investigators, court reporters, the bailiff, court clerk have been down a long road together, and I am sort of a "Johnny-come-lately." I am very suddenly appearing in the penalty phase as associate counsel for the defense, and I regret we didn't have a chance to get to know each other a little bit during that voir dire process. In fact, your first introduction to me was probably as an unnecessary intruder. I know that I didn't endear myself to anyone during the first day of trial when I was called upon to cross-examine Jodi Whitman and Lisa Donaldson.

I appreciate the fact that you may have been offended that those young women were called upon 10 years later to testify about crimes that had been committed against them when they were 11 years old. But bear in mind that the fact of Mr. McLain's conviction was established at the outset of these

proceedings by his stipulation to the fact that he had been convicted of those crimes, and the decision was made by the prosecution to bring those women back to resurrect what memory of those events they could, have them try to relive the torture of the experience in the park, and however Sherry Younger might describe the experience on Main Street on that evening of July 22, 1971.

The decision to call those women to testify, of course, encouraged Bob McLain to think, "I will get my chance to relitigate that 1971 conviction. I will get my chance to once again show a jury that there was a reasonable doubt that I was the man who accosted those girls in the park and confronted Sherry Younger on Main Street."

Alas, it was a false hope because the retrial of the 1971 charges couldn't begin to be presented to you in the context of faded memories.

Mr. Kossoris would ask you to accept the 1971 conviction and its permanence as settle. There is no reason at all for you to begin to question whether Bob McLain's perception of what occurred in 1971 is plausible.

Well, one month ago, on March 6, 1981, the news media throughout this state and probably elsewhere reported an event in the San Francisco area when a fellow by the name of Aaron Lee Owens was released from California Prison after spending nine years for two murder convictions. Although a jury had found Mr. Owens guilty beyond a reasonable doubt in 1972, the prosecution authorities discovered that there had been a mistake in identity, resulting in the conviction of an innocent man.

When the Superior Court Judge, Judge Allen Lindsey, dismissed the charges just last month, he said, and I quote, "Human institutions, like human beings, fall short of perfection. We can be grateful that

there's a second chance in a free and secure country."

Mr. Owens was fortunate that there was no death penalty when he was convicted, and the mistake could be corrected. I am sure that the jurors who returned that verdict of guilty against Mr. Owens in 1972 thought that the matter was settled and had no doubt about the sincerity and correctness of their verdict.

I think there's something else that's important for you to keep in mind as you survey this life of crime of in and out of prison that Mr. Kossoris has described about Mr. McLain. It's apparent that nearly the entirety of the last 20 years of his life -- from age 20 to 40, from 21 to 41, nearly the entirety of it has been spent in penal institutions. He has only been out for that brief period of time between 1969 and 1971, and then shortly before the events which cased his prosecution here, and in Solano County. So 19 out of 21 years, between ages 20 and 41, had been spent in penal institutions, and I would suggest to you that you keep that in mind in looking at the last 20 years of this man's adult life.

We know that before that he spent a great deal of time as a yough[sic] in institutions, and I am going to suggest to you that he just simply is not equipped and cannot be expected to be equipped to function in a free society, and an institution is the proper place for Mr. McLain to spend the rest of his life.

The verdict forms that you will be presented when you retire to deliberate is fairly simple and gives you just the two choices that the prosecutor referred to. You will be permitted to check a space that indicates that you find that the aggravating circumstances outweigh the mitigating circumstances and fix the penalty of death, or you will check the other box, the mitigating circumstances outweigh the aggravating

circumstances and fix the penalty as confinement in the state prison for life without the possibility of parole.

And the Court will instruct you, as the prosecutor has suggested, concerning the factors which you should consider in making that determination.

Interestingly, all of the factors aren't on the chart, and the chart doesn't remind you, as Judge Storch will, that as to other crimes for which the defendant was not tried, you must be convinced beyond a reasonable doubt that the defendant's guilt has been proved. Perhaps more significantly, however, although in closing Mr. Kossoris suggested that it was terribly important, omitted from his chart is evidence bearing upon Bob McLain's background, his history, his character, his mental state, his condition.

And I would suggest to you that although the prosecutor wants to deny and diminish and make insignificant the defendant's background and history and mental state and condition, that that evidence is at least entitled to your serious consideration as any other evidence in this case.

And I think that its omission from the chart is a grevious[sic] oversight. There is no question about the fact that the defense presents to you a somewhat split personality. The defense must approach your determination of penalty from two entirely different perspectives: one is rooted in Bob McLain's perception of reality, his insistance[sic] that he's not the person responsible for the attacks on Jodi Whitman, Lisa Donaldson, and Sherry Younger, and he's not the person responsible for the deaths of Diane Bossergeny and Joni Kelley.

Mr. Kossoris finds in this letter to Mary Rich, Exhibit No. 10, evidence of bad character -- evidence that there's no remorse, and he diminishes and minimizes and ridicules Bob McLain's suggestion that during that brief period of time when he was apparently

employed at Sambo's that he tried to do good but if given the chance in the future, he will not try.

There's another portion of this letter that Mr. Kossoris has characterized in his examination of the defendant and will, I am sure, characterize in his comments to you as indicating further evidence of depravity and threat and bad character. "Teddie will never survive in prison," he writes to Mary Rich, "because I know too much people in prison, and when they found out he blamed me for these crimes he did, he will have nothing but trouble -- that is, if he lives. But I doubt very much if he will, and I won't try to help him at all."

I suggest to you, ladies and gentlemen, that this letter is entitled to another interpretation and that this is just another statement by Mr. McLain that Teddie had placed on Mr. McLain's shoulders the responsibility for something that he and Lloyd Ketcherside had done and that he was also characterizing a reality of prison life and one with which he was all too intimately familiar.

And also, it makes reference to his instinctive feelings of helping people, although he probably didn't consider that in writing the letter to Mary Rich. Instinctively he would have thought to help people, but he's not going to help Teddie, not as a result of what Teddie did to him in that betrayal.

Now, one perspective of our split personality is rooted in Bob's perception of reality, and the other perspective is rooted in the reality that three separate juries have determined -- including your determination -- that despite his denial, Bob McLain's guilt has been established beyond a reasonable doubt. You and two other juries have made those determinations.

And so the split presents an awkward situation because we are in the position of attempting to

show facts that cast doubt about the conviction, certainly about the 1971 conviction, but at the same time we must accept the reality of those convictions and urge that Bob McLain's life should be spared despite the existence of those convictions.

And I think that it is apparent that at least for the conviction in 1971, Bob McLain paid his debt to society by serving eight years in state prison.

But insofar as Bob McLain's perception of reality is concerned and Dr. Evans described it as distorted, is it possible, just ever so slightly possible, that he was not the man who attacked the girls in the park, that he was not the man who stood on Main Street with traffic passing by, holding his penis in one hand and waving a gun in the other? Showing off with a toy gun is the way Sherry Younger described it.

Do you accept the possibility that he was not with Lloyd Ketcherside and Teddie Willis when Diane Bossergeny was killed?

Ladies and gentlemen, there are concededly aggravating circumstances in this case, which, if standing alone, would justify your choice of death for Bob McLain. But contrary to the prosecutor's presentation, they don't stand alone.

It's been suggested to you that during those last 20 years of incarceration with brief intervals of freedom, Bob McLain has had plenty of chance to reform.

Now, I'm going to suggest to you the only chance he had would be to adjust to institutional living. After an adolescence in juvenile facilities, his twenties and thirties, in prison on two separate sentences, the entire decade of the '60's and '70's, it's no wonder that his ability to function outside an institutional facility is impaired.

This man started out with at least two strikes against him: an elderly, invalid father who beat

him with a cane, with a belt, with a rose bush, a poverty environment, a marginal IQ. He doesn't celebrate holidays; he never celebrated holidays. They weren't a part of his lifetime. No nurturing, supportive figure in his life.

It's little wonder that he developed the classic personality disorder that Dr. Evans described. It's no wonder that his emotional development was arrested in his teens. It's no wonder that he finds his peers people in that teenage group.

Is this a man, however, without redeeming features? The prosecutor would have you believe so. Yet, how do you account for the fierce loyalty demonstrated dramatically on the witness stand by Jackie Smith, irrespective of the credibility you assign to her testimony, this obviously mentally handicapped person. Is her testimony -- is her feeling to be dismissed in its entirety or only that portion which doesn't fit into the prosecutor's theory of the case?

How do you account for Cynthia Ann Funston, the waitress from Sambo's? Traveling down here to lie about her friendship with Bob McLain and his help to herself and other waitresses and other employees at Sambo's, with knowledge of the crimes for which he's been convicted? Who can explain that lovely young woman, Cindy Funston, who traveled here to tell you about a lovely day she spent with Bob McLain, a nice, polite, friendly gentlemanly person -- a day at the zoo and a dinner in the evening, which Mr. Kossoris ridicules.

The fact of the matter is, despite Bob McLain's implication and conviction for involvement in some hideous crimes, this pathetic person likes to help people, usually his emotional and mental peers -- adolescents, the retarded, the aged, the infirm, others with handicaps, and those who are picked upon.

Do you doubt that Bob McLain was in

fact attentive to his mother during that brief period of freedom between 1969 and '71, despite the testimony of his sister Francis, the transcript of his brother James Obie McLain's testimony, his former wife, Nellie Spradling -- even Todd Forbes' mother, Mrs. Brandon, who came in yesterday, to deny any concerns that she might have had about her son's homosexuality, to describe the negative impact that Bob McLain had on him during his adolescence -- it appears that the prosecutor had hoped to discredit all those people who gave you testimony concerning Bob's attentions to his mother by having Mrs. Brandon testify that he was never there. That isn't the way it came out.

Mrs. Brandon said she saw him there occasionally, and he was there. "He was there no more often than I was," and she was there every other day and sometimes every day.

And I submit to you that this is all evidence in mitigation, the deprivation of childhood, the emotional immaturity, the the intellectual limitations, the poverty, the fierce loyalty inspired by those underdogs who he's befriended, the people who he's helped, Jackie and Glenn Smith, who were picked upon, who were giving rides and meals, Cindy Funston, who needed help moving and a place to store her property, the waitresses at Sambo's, taking Teddie Willis in, accepting a responsibility that he probably wasn't capable of fulfilling, when the Florida authorities couldn't find anyplace else to put him, Lloyd Ketcherside, who Jackie ask him, Bob McLain, to help because he was being hunted, Ed Bennifield, working as a cook at Sambo's, who needed help splitting the rent, and younger men in prison who needed help adjusting to relieve the pressure, his marriage of convenience, as he described it, a factor in mitigation.

You know, at first blush, as Mr. Kossoris would suggest, you should scoff at it. After all, he was

out riding around every night with teenagers, although he obviously took Nellie riding with him on occasion. He was apparently dating some teenager on the side, having a relationship with some other woman, a 19-year-old, unable to maintain steady employment, but he had a series of jobs.

But despite that extramarital behavior and despite the knowledge of his convictions, his record, the wife of this marriage of convenience stuck by Bob McLain during the first six years of his prison incarceration, and despite her remarriage, came here from Coalinga to testify in his behalf. I say that's evidence in mitigation.

I also suggest to you that neither Nellie, with that history behind her, nor her sister has any reason to lie to you about Bob's conduct or whether he was in that house on the night of Thursday, August the 12th, 1971, when they returned from that Salvation Army meeting.

I think that it's highly unlikely that Judy Neufeld, employed as a security guard at a Bakersfield airport, has any motivation now, 10 years later, without any contact of this man here, to come to you in this courtroom and lie to you about the events of 1971.

The prosecutor has told you that Bob McLain feels no remorse and has attempted to persuade you there is no remorse by virtue of his interpretation of Bob's conduct.

Bob McLain testified, and he was asked about his feelings, and he told you in his words, "It makes me feel bad that it happened. It shouldn't have happened, but I didn't know her and I didn't do it. I haven't cried, but I feel bad."

I think that one remarkable aspect of this penalty phase was the testimony of Dr. Evans. And to the prosecutor's credit, I think that he has dealt with it in a very straightforward fashion.

You know, the subject of psychiatric testimony in criminal cases is very controversial, and you may have read articles concerning that controversy and the fight that ensues as professional charlatans come into court and render opinions concerning how various mental disorders are responsible for various behavior, but I don't believe that you will conclude, based upon the appearance of Dr. Evans in this case and his candid responses, both to the questions and of Mr. Pell and Mr. Kossoris, that he feels even close to that characterization.

I think that you should consider very carefully his responses to the questions by the prosecution as well as Mr. Pell. He was not evasive. He identified some traits of Mr. McLain that are not admirable, aggravation. He identified some traits of Mr. McLain that were positive, mitigation. He read to you the classic characteristics of two major personality disorders, and the disorders that he perceives of Bob McLain, and you must have been struck from the concurrence of those definitions with evidence that you had heard in this case from a variety of subjects.

And the performance of Bob McLain on the witness stand could only reinforce your acceptance of Dr. Evans' diagnosis. For example, he identified as one characteristic trait statements made to provoke others without regard to the potential consequences.

This scenario that I've related to and this history, in addition to producing a man who has in his limited opportunity as an adult outside of the prison environment, tried to help others, has also produced a defiant man who does not bend over backwards, who is full of bravado.

Now, Mr. Kossoris has suggested to you that his statements bear no relationship to the truth. But I suggest to you that he doesn't really mean that because he wants you to be selective. He certainly

wants you to believe that when Mr. McLain boasts, "I'm going to rape a woman someday," that that's a truthful statement; he intends to do that. "I'm going to shoot a cop," that's a truthful statement. He wants you to believe that. There's no evidence that he ever has. "Next time it's not going to be nonviolent," and yet there's no evidence that Mr. McLain has engaged in any violent escapes. It's talk.

Mr. McLain said, "I have a bad habit of helping people. Everytime I do, I get in trouble." I would say he has a bad habit of shooting off his mouth, and everytime he does, he gets in trouble. But there's a big difference between shooting off your mouth and actually doing.

One's eyebrows had to have been raised by the strange testimony of that David Williams, that lay psychologist who apparently taunts his people in his custody in calling them queer, provoking them, "Why don't you shoot yourself," but such is life in custody.

This is a braggart, a boaster, full of bravado, but a doer of violence? Well, certainly not in the case of shooting police officers or engaging in violent escapes. He's a person who has a distorted view of reality and his place in it. There's no doubt about that. And it showed itself in its worse context, in the confrontation between Bob McLain and Mr. Kossoris.

Did you fully appreciate the significance of that confrontation? I sat there, suddenly cognizant that Bob McLain was sitting on that witness stand, about to be examined by the man to -- who seeks to have him killed, who is asking that he be condemned to death. He's about to engage in some verbal sparring with the person who wants to see him die and will be asking for his death and has asked for his death.

I tried to place myself in that position and a courtroom full of people who can't identify where I've been, where I'm coming from, and how I've grown up,

facing the man who has the power and the will and the skill to demand my death.

I suppose the result was predictable, a terrible mismatch. I've tried to think of some analogies to lopsided sports scores, to analogize the prosecutor to some high powered collegiate basketball team versus some high school team. Somehow or other, they seem very inappropriate.

Nothing can dull Mr. McLain's bravado, the fact that he was overmatched. The offbeat question came: "What would you like the jury to sentence you to, Mr. McLain, life without parole or death?" -- as if he had a choice.

Prompt response: "Don't matter to me."

Well, ladies and gentlemen, that's one part of Bob McLain's testimony that I ask you to disbelieve. It matters a hell of a lot to him. But I also ask you to believe, as I'm sure Mr. Kossoris would ask you to believe, despite the fact that he tells you that his statements are his testimony bear no relationship to the truth, that he did want to escape in 1971.

"Did you want to escape?" he was asked, and he sure came back right away, he wanted to escape.

"Did you tell David Hicks that you wanted to go to Santa Barbara, invite him to go up to Santa Barbara and commit a rape?"

"No. I invited him to come up and commit a burglary." Prompt response.

Let's talk a little bit about that 1971 conviction and why it's here. I think it's somewhat sad that those three young women were called upon by the prosecution to relive that experience, and it's sad that Sherry Younger was flown down here from Alaska to testify about an incident she really didn't take terribly seriously at the time; she did handle very skillfully.

But that strange encounter on Main Street that she described to you where that pathetic person, in

response to her question, "Why don't you catch the rabbit and we will talk about it," "well, if I catch the rabbit, will you?" That resulted in this man's conviction for attempted rape and attempted child molest.

I think it's somewhat sad, in view of Dr. Miller's testimony, that Jodi Whitman and Lisa Donaldson have grown up firmly believing that they were raped, that they were forced to engage in an act of sexual intercourse.

The testimony of their own doctor does not support that conclusion. Dr. Miller testified you could not insert an adult penis in the vagina of these two girls without tearing the hymen, and there was no tearing or laceration of the hymen.

Dr. Miller said he found only an indication of an attempt at penetration. It would have been just as helpful for these young women to grow up thinking that certainly they had a terrible experience, and I don't mean to minimize that, but just to help them grow up, knowing that in fact the object which they believed to be the penis of a man was not in fact the penis of a man. They had been molested but they had not been raped.

It's somewhat sad and troublesome that Jodi Whitman has maintained such a close interest in the prosecution that she can volunteer to you, "You mean the penalty phase?" She's obviously followed it very closely and testified in Solano County, was well prepared and well rehearsed, as was Lisa, to testify on direct examination.

And isn't it strange that when I tried to cross-examine to resurrect any other memories than those that had been prepared on direct examination, it's just a string of "I don't remember, I don't recall; I don't remember, I don't recall," and therein vanished any thought that Bob McLain might have had that you would have an opportunity to hear why he believes the

1971 conviction was one for which he was wrongly convicted.

The prosecutor asks the witness, "Did anyone suggest to you that you should pick out a particular person in the photographs? Did anyone suggest to you that you should pick out somebody in the lineup?"

I submit to you that suggestion occurs without any such blatant testimony. And Sherry Younger did tell you that when she went to the lineup, she assumed somebody was in custody and she assumed she was supposed to pick somebody out of that lineup. The others just didn't remember.

Well, one thing is abundantly clear from the description of all three of the victims, Lisa, Jodi, and Sherry: The man or men who attacked them had a flattop -- a crew-cut, and that was one characteristic about which they were clear. Wore sunglasses. Sherry described the man as tall, and you have seen Mr. McLain in the courtroom. I don't think he's shriveled up over the past 10 years, but one thing that was really clear was he had a crew-cut, a flattop.

Well, there was a reason for passing these photographs to you, and you may look at them and see, a bunch of suspicious looking people -- when you get through these photographs and examine them very carefully for somebody with a flattop or a crew-cut, there's only one person left. It's Mr. McLain.

I'm going to submit to you, if you look at these very carefully, there's only one person that comes close to the description that these young women gave when they were 11 years old. And then they went to a lineup and in that lineup there was only one person whose photograph had been shown to them. There was definitely one person in that lineup who they had seen before. And Sherry, who hadn't been able to pick anybody out of the photographs, hesitated over four,

five, and six, and asked them to come back for a second shot.

Well, ladies and gentlemen, I'm asking you to examine this lineup photograph real carefully to, in the context of the description these three young girls had given, and match the photograph with the physical descriptions that are summarized on Exhibit N -- you will find that there were two men in here who were four inches taller than Mr. McLain. None of them weighed as little as Mr. McLain. All of them, with the exception of number four, had long hair. Number one doesn't even come close. Number two is worse. And number six -- number three is tall with dark long curly hair, and number six -- whoever Sherry Younger had some hesitation over when she had four, five, and six come back -- appears to be a man of the Latin extraction, dark, long black hair.

What I am suggesting to you was there was a suggestion, not pick number four, but the suggestion that's inherent in showing photographs, only one of which comes close to the description, and one of the most significant features being the length of the hair.

Think carefully about the circumstances under which Jodi and Lisa were asked to identify the person who had attacked them in that dark cemetery park, that dark, unlighted park -- a man comes up to them wearing sunglasses in the dark, and both of them testify that they kept their eyes closed most of the time.

Sherry Younger did not deny that the car she saw when she was interviewed by Detective Spellman on the day afterward and the car that she had described that night was a dark blue, almost purple Chevrolet. She saw the word "Chevrolet."

This is the closest that Bob McLain's light blue Mercury could come -- in Defendant's A. I am simply suggesting to you, ladies and gentlemen, that

although, if you had heard all the evidence, you may have come to the conclusion -- the same conclusion that the 1971 jury did -- that there is the possibility that Mr. McLain was not the man who made that ineffectual approach of Sherry Younger on Main Street and he was not the man who attacked Jodi and Lisa in the park.

You know, they gathered a lot of physical evidence. They gathered evidence the day afterward, in the afternoon, when they executed that search warrant, and most of it is summarized in Defendant's J-1, and they took that evidence to the crime laboratory, along with the clothing that they attained from Jodi and Lisa, and you haven't seen it yet, but you are entitled to ask for the exhibits when you go into the jury room for deliberation, and I ask you to look at these documents that are contained in Defendant's Exhibit F. These are the crime laboratory reports, and these documents, you will see the efforts to match the samples and the dirt samples and the grass samples with anything on Bob McLain's tennis shoes, which he always wore, or his boots or his pants or his jacket.

And the fact of the matter is there is nothing. There is no physical connection with Bob McLain to that incident in the park. It rests solely on the impressions and observations and opinions of those two 11-year-old girls.

This is the gun that Nellie Spradling said was hers. They seized her gun when they executed the search warrant. Certainly doesn't come close to the gun that Lisa and Jodi described. It's not the gun that David Hicks -- who also acknowledged to you his three felony convictions for theft -- it's not the gun he ever saw the defendant with. It's not the gun that Todd Forbes saw him on occasion with, although both those men spent a lot of time with the defendant. Apparently he didn't have the gun with him very often, but he owned a gun. But this wasn't it.

I suggest to you this is not the gun that was carried by the man, whoever he was, in the cemetery park.

I asked you at the outset to think of the fact that nearly the entirety of this man's adult life has been spent in institutions and that he's not equipped to cope with the demands of modern society and that he should be confined in a cage. It's really the only life he knows. It's a structured environment of which Dr. Evans testified.

But there's a more compelling reason why you should not vote to kill Bob McLain, and that reason is Lloyd Ketcherside. Now, you have an advantage over me. You saw and heard Mr. Ketcherside. That was an experience I missed. I have only heard about him.

The importance of Mr. Ketcherside is that he walks away from the deaths of Diane Bazzargani and Joni Kelley with no legal consequences. He's up to his ears in the killings, but he comes away unscathed. It's a fact of life that sometimes the prosecution must grant immunity to obtain favorable testimony from one of several joint subjects. It's a price that must be paid.

But in this case, the prosecution not only asks you to confirm the decision to grant immunity so it can convict Bob McLain, but it asks you to go one step further and confirm the decision that Bob McLain should die and Lloyd Ketcherside should live, and live free.

You may be able to accept the first decision, because it's a fact of life, but I urge you to reject confirmation of that second decision, and you can reject it by deciding that for his involvement in these crimes, Bob McLain should spend the rest of his life confined in state prison.

Human judgment cannot be infallible, but death makes a miscarriage of justice irrevocable, and there's ample protection to society by life in prison. I

told you about the experience of Mr. Owens, who was released after nine years in prison for his two murder convictions last month -- mistaken identity is not unusual, and indeed, we even had evidence of mistaken identity in this case, which was acknowledged. Allen Armstrong, you may recall, the former police officer who testified that he stopped Mr. McLain when he was walking back towards the jail down on Main Street and -- in West Ventura -- after his escape, told you that he had thought that he had contact with Mr. McLain in the past.

But he was wrong. He was mistaken. He acknowledged it. It was actually his brother. Simple case of mistaken identity.

Todd Forbes or David Hicks told you there wasn't really much of a similarity between Bob McLain and his brother. Even Chief Johnson, who was then Sergeant Johnson, acknowledged that witnesses in stressful situations are often off in color and other aspects of identification.

Mistaken identity occurs frequently in human activities, and I submit to you that the impressions of those two 11-year-old girls in that dark park were highly susceptible of subtle suggestion.

I will not attack your sensibility with a detailed description of the process by which a verdict of death would be carried out. In this state, the method is asfixiation[sic]. People are choked to death by confinement in a room in which cyanide pellets are dropped into sulfuric acid, but you can't divorce yourselves from the responsibility that your decision will activate that process. You won't be -- you will be in the comfort of your home, or work or engaged in some recreational or education pursuit. But you will not be there because your order will be carried out.

And you must accept the enormity of that decision. The persons responsible for the deaths of Joni

Kelley and Diane Bazzargani did not provide them with justice, but you are different from them. You represent society and although society is justifiably repelled by the outrage of their deaths, society expects you to behave differently from their killers. That's what elevates us above the animals, and you represent all of us. Don't act out of outrage or vengence[sic].

I too ask you to follow the law. I ask you to consider all the factors in mitigation and aggravation, and I believe that you will conclude that the verdict forms must be signed in the space provided for life imprisonment without the possibility of parole.

Thank you very much.

THE COURT: Ladies and gentlemen, we will recess for the noon lunch hour. Keep the Court's admonition in mind, please, throughout the recess, please. You are not permitted to discuss the case among yourselves nor with any other persons, nor form or express any opinions on it until it's finally submitted to you.

We will reconvene at --

MR. PELL: 1:40, your Honor?

THE COURT: 1:40, for further argument. You are excused.

I would like the visitors to remain.

MR. PELL: How about 2:00?

THE COURT: All right. 2:00 o'clock.

(The proceedings were recessed for the lunch hour, to be reconvened at 2:00 P.M., of the same day.

VENTURA, CALIFORNIA; THURSDAY, APRIL 9, 1981; P.M. SESSION

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(The following proceedings were held in open court, outside the hearing and presence of the jury:)

THE COURT: We are on the record outside the presence of the jury. Counsel and defendant are present.

I have met with counsel in chambers to review what will be said by the prosecution in closing argument with respect to the matter pertaining to Mr. Chatman, to which the Court addressed itself in admonition to the jury prior to the commencement of Mr. Eskin's opening argument.

I have reviewed what counsel now intends to state to the jury with both counsel. It meets with the approval of both sides and meets with the approval of the Court.

Does that accurately reflect the state of the record?

MR. KOSSORIS: Yes. I would like to just file a copy of it --

THE COURT: Well, I have a copy here that I will at this time order made part of the file and do order filed.

MR. KOSSORIS: Okay. Fine.

THE COURT: Is that correct, Mr. Pell?

MR. PELL: That is correct, your Honor.

THE COURT: All right. At this time I would like to have the jury, please.

(The following proceedings were held in open court, within the hearing and presence of the jury:)

THE COURT: Record will at this time show the presence of the members of the jury. Counsel are

present; defendant is present.

Ladies and gentlemen of the jury, you will now hear closing argument on behalf of the People by Mr. Kossoris.

MR. KOSSORIS: Thank you, your Honor.

I am sure all of you will be happy to hear that it will be a good deal shorter than opening argument.

First, I would like to make a couple of comments about Mr. Chatman. I didn't mean to suggest that anyone connected with the defense suggested that he lie or encouraged him to do so or knowingly promote his false testimony, and I am sure that no one connected with the defense did do that or would do that.

On the other hand, it certainly is my contention that Mr. Chatman, for reasons of his own, intentionally did give false testimony regarding the deposition and that he did it because of his desire to help Mr. McLain and his general hostility toward law enforcement and the authorities.

And I think the evidence also suggests that Mr. Gerber's interview procedure of advising Mr. Chatman what Mr. McLain was saying about the deposition and its relationship to the case was not the way the interview should have been conducted and that Mr. Gerber, by following that procedure, thereby provided Mr. Chatman with information he needed to concoct a false story to benefit Mr. McLain, even though Mr. Gerber did not intentionally promote the giving of a false story or testimony, and I think the rest of the evidence, particularly when you relate back to what Mr. McLain originally said, gave a totally different version of who had written a deposition -- combined with Mr. Chatman's inability to recall anything that was in it, shows that this was just a recent fabrication by Mr. Chatman and for his own reasons.

Now, in this argument, I am not going to rehash what's already been said. I'm going to reply to a number of comments made by Mr. Eskin, that the purpose of rebuttal argument -- after I am finished and Mr. -- then Mr. Pell will have an opportunity to give the final closing argument, somebody has to go last, and in the guilt phase I got the opportunity to do that; and hopefully, Mr. Pell will limit himself to attempting to rebut any argument I make now.

MR. PELL: Objections. That's --

THE COURT: There's no objection called for, Mr. Pell.

Go ahead, please.

MR. KOSSORIS: There were some comments made by Mr. Eskin referring to the case that had been in the paper, the Owens case -- I'm not going to try to reply to that. None of the facts of that are before you and, consequently, I think it would be pure speculation to try to figure out what happened. But it seemed to me the gist of what Mr. Eskin was really suggesting is, since there's always the possibility presumably that somebody could be wrongfully convicted -- and I'm sure out of thousands of convictions, it does occasionally happen -- that someone is -- therefore, presumably, nobody should get the death penalty.

But I would suggest that the argument, which is really an invitation to simply not consider the death penalty in this case, or any case, if it's carried to its logical conclusion, has even less force when you are dealing with the person who has not just been convicted of a series of episodes in Ventura County that you heard about in the guilt phase but has the prior record that Mr. McLain has and then committed another murder.

And ***at some point, it seems to me, it becomes apparent that we are not dealing with the person who just by random chance or misfortune happened to be***

falsely identified by someone and, knowing what you know about Mr. McLain and having heard his own psychologist tell you about his personality profile and having heard Francis Salerno, his sister, tell you about his background of having been in trouble continuously since the age of 12, I would suggest that you can disregard the possibility that simply by some awful fate or misfortune, he happened to get convicted of some crime he never did.

Another argument Mr. Eskin made is, well, Mr. McLain has been in custody 19 of the last 21 years; and, therefore, he never had an adequate opportunity to adjust himself to society, and this is supposed to be somehow, I suppose, some sort of a mitigating factor, but ***I would suggest the fact that he's been in custody 19 of the last 21 years is due to no one's fault but his own. It's due to his own inability or unwillingness to conform to the law.***

You know, it's kind of like a person who murdered his parents and then pled for leniency on the grounds that he was an orphan.

Mr. McLain has been in custody because of his own misdeeds, and he hardly should be heard to come in and say, "Well, gee, I just haven't had a chance because every time I get out, I go out and commit a new crime and I'm right back in custody." And even in custody, you know, that he's committed crimes, illegal possession of a homemade knife in prison, illegal escapes, so he hardly deserves any kind of leniency or benefit because of his own misdeeds.

Now, there was a statement made by Mr. Eskin that, well, it's true, there are aggravating circumstances which, if taken alone, would justify death, but he says, well, there are mitigating circumstances which should change that.

Well, here again is the list of factors that you are going to be receiving from the Court as factors to consider. I'm not going to review each of them again

as I did in my opening argument, but simply repeat that I think there isn't a single one of them which doesn't come out as a net minus for the defendant.

And then if you go to the final catch-all, his character, history, mental and physical state, that is the most damning of all. What kind of examples did we hear about mitigating factors from Mr. Eskin? Well, we heard reference to the fact that he never had the chance to celebrate holidays or he didn't celebrate holidays.

Well, I put it to you that -- on a scale where you are considering rape, robbery, murder, cruelty, sadism, that that ranks pretty low as a mitigating factor, to balance against the factors that we have heard about in the evidence that you have received.

And the statement was made, "Well, he likes to help people, the young, the handicapped." Well, how much did he help Todd Forbes? We heard from Todd's mother that when Todd was running around with Robert McLain, his behavior significantly regressed and that as soon as Bob -- Robert McLain was arrested and put in custody, there was a dramatic change for the better.

And do you think the defendant was a good influence on Lloyd and Teddie? And they were bad enough as it was, but he certainly didn't make them better. And we are asked to consider as a mitigating factor that he took Lloyd and Teddie in. And this is something -- supposed to be something in his favor. Why did he take them in? Was this an act of good-will on his part, motivated by the desire to reform them from the problems that they have had and the misdeeds that they may have committed in the past? I think it's obvious why he took Lloyd and Teddie in. He took Lloyd and Teddie in because they were already well along on the road to crime, because he wanted to use them, because he planned to commit crimes himself.

He planned to come down to Ventura and commit the crimes for which you convicted him, and he viewed Lloyd and Teddie as persons who would be predisposed to help him, who would be readily willing to do what he wanted them to do and who would be of assistance to him, as they were of assistance to one degree or another in what he planned to do in Ventura.

That's hardly a mitigating factor in his favor. Of course, he again is happy to tell you, "Well, gee, my big problem is I like to do things for other people and it gets me in trouble."

And we are told that one of the big factors -- maybe the biggest factor that you ought to consider in evaluating mitigating factors is that Lloyd got immunity and Lloyd got off.

I don't know where you find that on the list of factors to consider in mitigation or the list you will be given by the Court. Nevertheless, you are urged somehow not to give the defendant the death penalty, despite the overwhelming evidence of aggravation, because of the fact that Lloyd got immunity.

I don't see what that has to do with anything. You may or may not agree that Lloyd should have gotten immunity. I don't know what your feeling is as to what Lloyd's degree of culpability was. I would suggest if that were the issue, that Lloyd, if he were being tried, would be entitled to a trial just like Mr. McLain and be defendant and have evidence presented in his behalf and that that would be the way to determine what his culpability was. But I don't know that it makes any difference at all under these circumstances, and I think again, it's scraping the bottom of the barrel, really an admission of the weakness of their case, that the defense would say, "Well, because Lloyd isn't going to be punished for these offenses, you should not give the defendant the sentence that the aggravating factors show that he

deserves and should receive under the law and the evidence."

Now, Mr. Eskin said, "Well, it's sad that Jodi followed this so closely,:" as though somehow there's either something improper about it or it's kind of strange or maybe the suggestion that it's somehow harmful, and I suppose the inference was we really shouldn't have used her as a witness because maybe it would have been better for her not to come to court and testify.

Now, is it the least bit surprising that Jodi would follow this closely? I mean here Bob McLain rapes her, molests her, threatens her life when she's 11 years old, causing her so much trauma, emotionally and physically, and then he comes back to do it again, and you can only imagine how frightened and upset this must have been for her.

Wouldn't you expect that it would be hard for her to get it off of her mind? And remember, he's a guy -- he's escaped twice, and it would be fair to conclude that she's concerned about that. You can imagine that she must be scared out of her mind. And it's hardly surprising that she would follow it, that she would want to come to court to testify, that she would want to see him receive the most stringent possible sentence.

I don't see what is the least bit abnormal or surprising about that. Wouldn't i[t] be incredible if it were the other way around, if after what's happened to her, she was able to somehow forget it and was indifferent to what's going on? That would be almost impossible to conceive of.

And it's said, "Well, she was well rehearsed." I don't know quite what that means. The testimony is clear that she was given her transcript to read, listened to her tape, conferred with myself and my investigator. I don't see what is surprising about that.

And it was claimed that, well, Jodi and Lisa couldn't recall some of the things they were asked on cross-examination. Well, true, they couldn't. And in most cases, when they couldn't, their prior testimony was used to refresh their recollection and was read into the record.

But I think it's apparent that they recall the essentials of what happened. I don't think the girls will ever in their entire life be able to forget the unspeakable horrors that they experienced on August 12, 1971. And I think when you go back, for instance, and consider Lisa's testimony, or Jodi's testimony, when they were asked what happened in the park, they remembered that. Sure, if you ask them details, precisely what time did you leave the swimming pool, precisely what color was this or that, they are not going to remember that. That wasn't important to them. And you wouldn't expect it would be important to them.

But they will remember the essential details, and it was obvious that they did remember the essential details of what happened, and pain and suffering they experienced, until the day they die.

Now, there's complaints about the photo lineup and physical lineup, and I suppose you can go back over any case and gripe about what happened. But what should have been done, the defendant was a suspect, so his photo was included among others -- a number of other photos, and he was subsequently arrested for the offense.

Sure, should we have not had a lineup, what would the alternative to that have been? Bring the girls into court at the first hearing, which would presumably be the preliminary hearing, and there would only be one person plus their attorney sitting at the counsel table, so it seems to me that would be a far more suggestive procedure than having a lineup with people who, I think, if you look at the pictures, you

would seem quite similar in appearance to the defendant.

And it's claimed, well, the '71 case rests solely on identifications by Jodi and Lisa. Well, of course, you haven't heard all the evidence that was presented them, but even what you have heard, you know that that's not the case at all.

What stronger evidence could you have in addition to the identification of the defendant, than the two teenagers, Todd and David, who drove around with the defendant, who the defendant proclaimed he was going to commit a rape, and who were at both of the locations involved in that case with the defendant, and one of which the church, the defendant said, this would be possibly the place he would do it.

And now, then, there's the argument about, well, were Jodi and Lisa raped. And I think Mr. Eskin said, "Well, it's sad that they grew up thinking they were raped," as though somehow, if somebody would inform them that they weren't raped, even though they thought they were, and the jury thought they were, somehow that would make it better.

Well, what was the evidence about the rape? You have heard some of it. They said they were raped. Dr. Miller said Lisa's external genitalia were visibly reddened and moderately swollen, but the hymen was intact, and that could have been caused by contact with an adult male penis, and that's an abnormal finding; in Jodi's case, sperm was present in the vagina and -- you know, it used to maybe be possibly believed, to have a rape, you had to have a full act of sexual intercourse and tearing of the hymen, but I hope you recall -- or if you don't recall -- the instruction you received on rape, which said that any sexual penetration, however slight, is sufficient to complete the crime of rape, and Dr. Miller referred a number of times to the fact that while I think it's certainly clear

from his testimony, the defendant couldn't have achieved full penetration without breaking the hymen, that this was evidence of an attempted rape, clearly, and I think the evidence strongly suggested that there's some sexual penetration.

And in Lisa, you will recall she testified that the defendant initially inserted his finger and then subsequently had an act of sexual intercourse, and that it felt different when the act of sexual intercourse occurred than when he inserted his finger and that it was quite painful when the act of sexual intercourse occurred.

I don't think it's the least bit surprising that the defendant was convicted of rape, and I think just on the evidence you have heard, it's obvious that given the instruction that there was a rape and that the defendant committed the rape on each of the girls -- not that it makes the slightest bit of difference.

It was claimed by Mr. Eskin there's no evidence of a violent escape. Well, I don't know what you call the 1971 escape. Seems to me it was pretty obvious that that was an escape by force and violence, that a number of people were involved, or, to be exact, that force was used, that a shank was used. The defendant held one on Mr. Noregon, the witness who testified, and we are talking about the fact that you have to prove another crime beyond a reasonable doubt. I think the evidence on that is undisputed.

The defendant on the stand himself admitted he escaped. And we know that he wanted to escape before then. So it's difficult to see what the mitigating circumstances are in this case; that he didn't get to celebrate holidays when he was a kid, that he may have stopped and helped one or more people fix a flat tire, that he took a girl out within the last year and a half and didn't criminally assault her. If that -- ***if those are the best things that we can say about Bob McLain, and***

a few other things of equal magnitude, weighed against the overwhelming evidence of vicious, cruel, depraved acts that you have heard, how can anyone conceivably conclude that the mitigating circumstances outweigh the aggravating circumstances?

It's obvious that it's just the opposite. So I would ask that you follow the law, that you consider the list of factors that the Court will give you, that you consider the defendant's mental state, physical state, background, history, and remember that we are talking about a history of crime, getting in trouble, cruelty, aggressive acts, manipulation, and all the things that his own psychologist described to you about him.

And again, I suggest to you that it's no answer to say, well, but he had a deprived childhood. But that's scraping the bottom of the barrel -- that when we are dealing with a 41-year-old man who's gotten worse and worse and who says now that he willingly and would spontaneously shoot a police officer if he were stopped coming back from a burglary or robbery, that if he was going to go, he would like to take a police officer with him, who writes a letter saying if he could get out now, he wouldn't try to be good; he'd be bad. And when you look at the lifetime of crime and the exceptional cruel acts and the suffering he's inflicted on other people, when you think of the suffering and pain, both emotional and physical, that Robert McLain has inflicted, it's almost too overwhelming to think about.

When you think about what he's inflicted on Jodi Whitman and her family, on Lisa Donaldson, on Sherry Younger, think about his felony convictions in 1960 for burglary, robbery, kidnapping -- pardon me, 1962 -- a child molest conviction in 1960 -- his coming back to commit revenge on Jodi in 1971, the pain and suffering that were inflicted on Joni Kelley, the crimes that were inflicted on Diane Bossergeny, the worst, most heavy strangulation he's ever seen in his life, and not an

ounce of remorse -- well, sure, the defendant said, yeah, he feels sorry it happened to Joni Kelley, but he hasn't cried about it because he didn't do it.

Now, did that impress you as a person who has real remorse or just as something he figured out that sounds good for him to say like that?

If Robert McLain doesn't deserve the death penalty for the exceptionally cruel, depraved acts that he's been committing all his life and which have gotten worse as he's gotten worse -- as he's gotten older, who would? What would merit the death penalty if the evidence that you have heard doesn't? I think it would be hard to conceive of what would.

So I would ask that you consider the evidence, that you follow the law, that you evaluate each of the factors that the Court will give you to consider. Again, it's not an easy thing we're asking you to do, but you all agreed to do it. And if you do follow the law, there's only one decision you can render that would be consistent with the instructions that you will receive, with the evidence that you have heard, and that would be a just verdict in this case, and that is to come back with the sentence of death.

And ***I would ask that after considering the arguments and the evidence, that you return the only verdict that you can return in good conscience, based on the evidence in this case, and that is that you return a sentence of death, because Robert McLain has richly earned that sentence by the life that he's led, the acts that he's committed.***

Thank you very much.

THE COURT: Ladies and gentlemen, we are going to take five minutes before proceeding with closing argument on behalf of the defendant. Please keep the Court's admonition in mind throughout the recess. Don't discuss the case among yourselves nor with any others nor form or express any opinions on it.

Please stay in the immediate area. The bailiff will summon you shortly.

(Recess.)

THE COURT: Record will once again reflect the presence of the members of the jury; counsel are present; defendant is present.

At this time, ladies and gentlemen, closing argument on behalf of the defendant by Mr. Pell.

MR. PELL: Thank you, your Honor.

Ladies and gentlemen of the jury, firstly, I would like to thank you for your courtesy and cooperation throughout the course of this rather long and protracted trial.

You know, I sat there and I listened to the skilled and expert arguments of two men approximately 15 years older than I, my co-counsel Mr. Eskin, and Mr. Kossoris, and I considered my 17 long months on this case as a Court-appointed counsel and thought about the words of Governor DeSalle of Ohio when he talked about the men in the position of Mr. McLain, men who are either on death row or sentenced to life in prison.

With one thing in common, several things in common, actually, that that Court-appointed counsel, that the defendants were penniless, of low mental capacity, that they had little or no education, that they had few friends, and such persons invariably came from broken homes, and those were the sacrificial lambs of society.

I stand up here feeling ill-equipped to argue for what Mr. McLain deserves. He deserves life. He deserves to be confined and cared for, because he requires that. He deserves to stay alive because the mitigating circumstances in this case far outweigh the aggravating circumstances. He deserves life because we cannot kill one one man, coldly, calculatedly kill one man and set another man free.

And the language concerning that is matters relating to sentence, including but not limited to one's background, character, and history.

Justice, that's what you are here for, and you have to weigh and balance the scales of justice, and can anyone permit the state, by your own actions, to kill Mr. McLain and have another man walk totally away, totally free?

One man sits here who is an object of pity, a man who sits here probably outraged by the things we say about him, but he sits here calmly and respectfully.

During the time, these months that I've spent with Mr. McLain, his times in the courtroom before you, you have observed no transgressions by him. He sat down calmly and listened to Lloyd Ketcherside testify against him with the promise and the grant of total immunity, total immunity, and we watched -- Lloyd Ketcherside lie to you, and I can't believe that you would have any question about the fact that he's a liar. We watched him lie to the jury in Solano County. We know he lied to Officer Hind, to Colston, to Peter Kossoris, to judges at the preliminary hearings. He lied. Certain things, when you weigh this case, must ring in your ears and weigh heavily in your heart.

You are conscious of society and you must weigh matters relevant to sentence. And those matters must be granted great weight, tremendous weight. When you watch Lloyd Ketcherside get up and walk out of a courtroom a free man, and he would still be free today but for the fact that Lloyd Ketcherside, after driving off in that stolen Dodge Charger, after driving off off in Diane Bazzargani's vehicle, drove off in another stolen vehicle after Mr. Kossoris and Mr. Kenney said so graciously, "You are free. Help us kill Mr. McLain."

Lloyd Ketcherside is as guilty as Mr.

McLain could possibly be for the death of Diana Bazzargani, for the death of Joni Kelley, and I don't believe that anyone with good conscience, anyone who has looked at this case, anyone who wants to maintain any semblance of truth and decency can dispute that.

Consider the testimony of Lloyd Ketcherside. You and I and everybody here knows that he was there. There's no question about that. He robbed her body. There's no question about that.

How do you suppose he knew how the rights fit on her fingers? He took them off after he killed her. You are the judges. You assign the weight to be given the factors in this case. And I say weigh heavily, ladies and gentlemen, Mr. McLain's background; weigh heavily the disparity of sentence, execution versus walking away.

What is more appropriate here? Life in prison without the possibility of parole. I ask you to consider the possibility of error. It's difficult to come before you and say, "Ladies and gentlemen, you were wrong." It's difficult to say that and have any feeling that you are going to believe me. You rejected my arguments previously; you rejected them during the guilt phase that has occurred. Let's put that behind us.

It's difficult to say, ladies and gentlemen, you were wrong, but I ask you to consider and entertain the possibility that you were wrong, and I'm going to talk about that more in a couple of minutes.

Think about age. Mr. McLain -- how old is he? Well, chronologically he's 41. But he's probably around 13, 14, or 15 years old mentally. He's a sad child, a 14-year-old Todd Forbes regressed in the presence of Mr. McLain. What does that tell you about that 30-year-old man 10 years ago, or that 41-year-old man today?

I ask you to think about his history. It's not one of merely not watering a plant. Mr. McLain is

like taking a rose seed and throwing it on the cement, not watering it, not nurturing it, and not planting it and blaming it for not being a rose. He just never had a chance.

Consider his ability to conform his conduct to eh[sic] law and weigh those things heavily. You, and you alone, can send Mr. McLain to the gas chamber. And you could be wrong about your decision. There can be no division of responsibility among you, because each of you must make that decision. And I hope that you won't compromise in this situation, that you will not kill a man in the deliberation room out of compromise. I hope that you will stand fast to your sense of justice and your sense of ethics.

I ask you to have an open mind, but I ask you not to kill out of compromise. I ask you not to deliberate and kill Mr. McLain. I plead for your human considerations. I plead for your charity. A man was truly created in God's image. You look at this case in light of your humanity. Consider what we are and the fact that we may in fact be wrong.

You have the power to convict, but what if you are wrong? What if you are wrong? Consider that for a moment. What happens if Lloyd Ketcherside goes out and kills again and at some point in time he were to come up and confess and say, "Gee, I framed Mr. McLain." I don't even know if you would believe him then.

Would you kill Mr. McLain upon his testimony now? What is justice, ladies and gentlemen? We hear talk of justice, but do any of us truly know what justice is? We may know a lot about charity and mercy and understanding. What about justice?

Well, maybe recognize justice by what it is not, and justice is not letting Lloyd Ketcherside walk free to prey upon us.

And executing Mr. McLain. It may be

something closer to Mr. McLain incarcerated forever because he cannot function on the outside. His past demonstrates that. He's unable to function properly on the outside. But that's a reason to incarcerate him forever. It's not a reason to kill him.

When can you kill? When you know positively.

Can you say that the evidence here is positive in your own minds? God observed the first murder. Cain gazed upon his beaten and bleeding brother, his body; he looked at Abel and God observed that first murder. And what did God do? God sentenced Cain to be banished for all time, and that was the judgment of the almighty God in dealing with the first murder, and he is exempt from the possibility of error. And I spoke to that because he who is errorless made the right decision there, but we can be wrong. We are not gods. We are infallible. We are not wiser than God. We may commit error, and it's possible, it's certainly possible in this case.

Isn't it possible that Lloyd Ketcherside and Teddie Willis, the people who were driving around in the Dodge Charter, where the -- where the blood was were the perpetrators? I ask you to entertain that possibility.

Lloyd Ketcherside went traipsing around in that Dodge Charger; Lloyd Ketcherside went driving around in the Bazzargani vehicle. Lloyd Ketcherside, who is he? He's the man who summed up this entire case, this God-forsaken tragedy, this death of two women, as saying the worst thing of all was that that Volkswagen was a piece of shit.

Is he not capable of these killings, these types of plannings? Lloyd Ketcherside, who gave you false stories about a pipe, about the pier, about the picking up of Joni Kelley, about everything else -- look at the two persons, look at Lloyd Ketcherside and look

at Teddie Willis, the only persons observed at the scene of the Bossergeny homicide, the only two, the only eyewitnesses presented before you. Consider that.

Other than Mr. Anderson, and Mr. Anderson, a nice old codger, a nice guy, is driving along on the road and he sees these two youths and he knows something is wrong and he takes a look and he looks over and he sees these two youths, Lloyd Ketcherside and Theodore Willis. Lloyd Ketcherside who is promised immunity in two counties, immunity for robbery, immunity for murder, in Solano County, immunity for the theft of the Bazzargani vehicle -- why do you think he was granted immunity, ladies and gentlemen? Why was he granted immunity here? Those two persons may be the guilty ones. You may be wrong.

Isn't it possible that Theodore Willis shot and killed Joni Kelley just the way he told J. S. Williams he did? Isn't that possible? You could be wrong about that. Certainly you could be wrong about the use allegation. Could you entertain that possibility in your mind? And when you consider whether or not you are going to execute a man, I take it that you must consider -- you must sit down and think, "Could I have been wrong? Could a mistake have occurred here?"

Why did Lloyd Ketcherside say that Teddie Willis was the one who shot Joni Kelley? Probably because he was there. He assisted, he observed, and he knew who shot her. And Lloyd Ketcherside, facing a murder charge, arrested for murder, at that point in time had the motivation to pin it elsewhere, and certainly Robert Cruz McLain is a convenient place to pin anything.

Lloyd Ketcherside and Theodore Willis, who according to Jackie Smith, Glen Smith -- and I think Lloyd Ketcherside arrived a day or a day and a half ahead of Mr. McLain into Solano County.

I beg you; I beg you to consider that it's possible that Robert Cruz McLain was not involved in -- you may be wrong. You may be wrong about the finding of the special circumstances.

Would it have affected your verdict in the least had you known that Lloyd Ketcherside was given immunity for the murder in Solano County and, therefore, he had the motivation to try to blame Robert Cruz McLain in the guilt phase here?

Yet the asme[sic] district attorney who grants Lloyd Ketcherside total immunity lets him walk out of the courtroom, asks for the death of my client and asks you to kill and stain your hands with the blood of Robert Cruz McLain, to put him into a gas chamber, an unhuman[sic] death -- the thing that we do to rabid dogs. How could you do that?

I have to confess to you that even the thought, the possibility of aiding and abetting such wickedness and violence, revolts me. The thought of fellow men executing Robert Cruz McLain. I ask you to consider whether or not you can have sleep-filled nights without being haunted by the fact that it's possible that you were indeed wrong. It's possible Mr. McLain does not deserve to die here. It's possible that Lloyd Ketcherside did it. It's possible that Lloyd bludgeoned her to death. It's possible that Teddie shot her. It's possible that they were together.

You may in fact be wrong about the participation of Robert Cruz McLain. And even if you were not wrong about that, would it then be proper to kill him? I submit not.

What, ladies and gentlemen, would you have decided if you had heard the testimony of Mr. Williams concerning the other fellow in juvenile hall in "A" wing, while Mr. McLain was at the county jail in Fairfield at that time? What about -- and I would like to call to your attention this deposition thing that comes

up, despite what the evidence is and what the apparent truth of the matter may be. You know, Mr. Kossoris has made some brilliant argument concerning the nonexistence of a deposition at any point in time, and everytime somebody comes up and testifies concerning the deposition, Mr. Kossoris attacks them vehemently in arguments and says, "That's a crock, ladies and gentlemen. That never occurred."

Well, I ask you to consider how much evidence does it take, one, to create a reasonable doubt in your mind as to the existence of it or, two, to convince you that it exists?

Now, Mr. McLain testified in the guilt phase of the trial and gave Mr. Kossoris ample opportunity to bring in Miss Leonard to say that she didn't see the deposition, the lady that I brought before you, and he didn't ask her anything about that deposition while she was on the stand, or Dr. Barclay, who Mr. McLain indicated had seen the deposition, and Francis Salerno, who has seen the deposition, and Lonnie Chatman, who we brought in that wrote the deposition. How much does it take? I don't know how much it takes, ladies and gentlemen.

I've been unsuccessful with you so far, but I submit you could possibly be wrong about that deposition about what Lonnie Chatman told you.

I spoke with him downstairs, right before he testified, and I asked him -- I asked him, "Do you recall about this? Do you recall the name?"

And he says, "No." And this is after he was refreshed with the name by John Gerber. How easily would it have been for him to just say, "Yeah. Gee, you know, it comes to me. It comes to my mind now. The gal's name started with a 'J,'" or something like that, if you wanted to invent a false story. How difficult would that have been, if he were to bend over backwards to perjure himself on the stand?

He says, "Listen, I've written a lot of papers. Most of those are pretty much to form, and I happen to remember this about Mr. McLain. It's unusual." It's a naive sort of thing Mr. McLain would do. It's the type of thing that would stick out in your mind.

And he didn't get up here and lie to you, as Mr. Kossoris suggests. Francis Salerno didn't lie when we had the stipulation regarding remembering the talk about that. Mr. Kossoris certainly is able to bring in evidence at the drop of a hat, is he not? We observed Todd Forbes, Mr. McLain gets on the stand and says, "I took the guy under my wing, and that was at the request of Todd's mother."

Well, in a flash, just a flash, who did we have here? Mr. Forbes. It didn't exist. I think we may have seen more evidence about its nonexistence, and I think -- ask you to weigh that and consider that you may have been wrong. It's possible. It's certainly possible.

What about the blood? Who has the blood all over their persons? Lloyd and Teddie. Lloyd has blood on him, and there's no question about that. That was by stipulation. He has blood on his trousers. One group is either type A, which is Joni Kelley's type, or type O, which is the type of Diane Bazzargani. The other spot is type O, which is the blood of Diane Bazzargani. And Willis has it all over him. He's got it on his left sock, his shoes; he's got it on his T-shirt.

And where, ladies and gentlemen, is the blood on Mr. McLain, and why is there no evidence of blood upon him?

Perhaps Joni Kelley or Diane Bazzargani might turn over in their graves were they to see Mr. Kossoris Lloyd Ketcherside free and asking for death of a man that no one ever saw.

Death is a bad thing here because gassing somebody to death on this type of evidence is only a

sick society. You cannot kill upon the testimony of somebody like Lloyd Ketcherside or Zolando Hockett. That would be a travesty of justice. That would be outright murder. This case is too weak to put Mr. McLain to death.

I want to talk to you now and change my focus towards Robert Cruz McLain, the man the prosecution asks you to deliberately destroy. There are a couple of ways of viewing Robert McLain. One is through his psychologist who is actually someone hired by the defense to spend hours with Mr. McLain in order to form an expert opinion about Mr. McLain.

And Dr. Evans testified, and he testified candidly. He testified truthfully. We put him before you, and he was subject to any attack Mr. Kossoris cared to make upon him. And if he said anything incorrect, Mr. Kossoris certainly could have brought another psychologist in to refute him and certainly the testimony of the people who know Robert McLain.

Well, wherein lies the value of the life, I seek to ask you, not to destroy. Well, you had people outside of custody and inside of custody talk about Robert Cruz McLain. And most of them had very nice things to say about him, very nice things to say about him. And if there are persons with bad things to say about him, I submit we may have heard about that.

Well, what did we hear about? We heard about another side of Robert Cruz McLain, another side than what the jury saw in Solano County or the jury saw in 1971. We saw times of kindness, times of caring, times of giving to others, assistance to those discarded by society, assistance to the disabled, Mr. McLain's desire, despite his background, to want to live a healthy, normal, worthwhile life and feel like a human being.

My God, is that so much to ask for? I think when you take a look at the good parts of Robert Cruz McLain, you have to conclude that but for the

deprived, deprived, very deprived childhood, Robert Cruz McLain probably would have become an outstanding member of the community, despite his meager intellectual capacity.

What does Francis Salerno tell us about Robert McLain? She tells us the family comes in 1936, during times of the depression, from Oklahoma, and this family -- this aged couple gets stranded in California with four kids, and this poor family, and they live under a tree, if you can imagine, and they live under burlap bags when they get donations in order to help them survive, and they are given charity, and Mr. McLain has these aged parents.

At 60, the father marries the mother, and Betty is born and Francis is born and Bob is about five years old at the time his father is 71, and he's aged and senile and he sits in a rocker and he has no role model, no one to take after, no one to teach him, no one around except this guy Arthur, who gets Bob McLain, a child at that time, involved in a burglary.

Bob's family is so poor that the big income in the family is welfare from the birth of a child, and as Bob is a little, tiny infant, his father has eight strokes, his father who doesn't like kids, who punishes -- and just stop and conceive of this -- the punishment, according to Francis -- and she wasn't lying about her punishment -- was quick and harsh. He used switches and he used a cane, and he beat that girl so severely that until the age of 30 she had scars.

But she was a little older than Bob, probably at a time when the mother at least gave some nurturing, and she probably got religious or had some role model to take care of her.

But Bob didn't have that. And you can imagine how, if the father beat her so severely, how he beat Robert. Robert's mother was already also sick, and here's a 12-year-old -- at 12 years old you have

Robert McLain, a paranoid personality, a person who believes the world's out to get him -- he's hit over the head with a baseball bat, receives a severe injury, has headaches for the rest of his life.

But Francis tells us that despite all that, despite all this depravity, despite his upbringing, he assists his mother, who probably never gave a care for him in her entire life, his mother who is on disability, and Bob, to get a smile -- as Evans would put it, that's what he needs is a smile and some care, wanting to ingratiate himself to her, be her personal servant; he's her nurse, servant, driver, single aide; he does the laundry. Bob is good for her -- he was good to her, and I doubt that he got a warm word or even a thanks for that.

What does Lonnie Chatman tell us about Robert Cruz McLain? Robert Cruz McLain spends about his entire life incarcerated. And how is this relevant to his background? What is Robert McLain like in prison? According to Lonnie Chatman, Robert Cruz McLain in prison is a quiet, shy, introverted person who gets along basically with his co-workers and the general population. Robert McLain is a good guy to have around. He's going to give you his money; he's going to try to protect you, and that's the type of person Lonnie Chatman sees. That's mitigation, despite all the rest that we have heard.

What about the staff psychologist? She tells us that Bob recognizes he has some problems. At least we learned that from her testimony. He's seeking help; he's seeking treatment. He's cooperative with her and she's the type of person, according to Dr. Evans, that he can talk to. She's an elderly lady who reaches out a nice hand and he goes and talks to her. She knows that Robert Cruz McLain went to prison as a result of a crime which was a sexual crime, bearing on sickness, and in 1960 he was convicted of child molest.

So we know he has a problem, and certainly at least he was seeking counseling. He was seeking some sort of help.

What about Jackie Smith? Jackie Smith is a pathetic person who most of us wouldn't want to be bothered or annoyed with. We wouldn't want to give her the time of day.

But she tells us basically -- this is not a quote, but it's her language -- but she says Mr. Robert Cruz McLain is a nice person. When she's unable to cope, Bob McLain is a friend. She likes Robert McLain. She cares about him. She's a friend of his. He's nice to her, kind to her, takes her for coffee.

What about Lloyd Ketcherside? And Jackie tells Hind right at the time of his arrest, while Hind is about to secure the rifle in the rest room, that Lloyd Ketcherside had the rifle. Robert McLain probably saved the whole situation. Certainly he had his opportunity and certainly declined that opportunity.

Teddie Willis -- Lloyd Ketcherside had that opportunity, and Lloyd certainly wanted to shoot it out with the police, because he was conscious of the fact that he was guilty. He was conscious of the fact he was charged with two murders.

How about Chief Johnson? Stop for a moment and think about all this, and ask yourself whether or not you would have a little bit of hostility, a little bit of animosity, a little bit of bad feelings when this guy is going around telling witnesses, including your wife, "Well, hopefully there's a time in the courtroom for justice."

And Mr. Kossoris talks about John Gerber supposedly telling Lonnie Chatman something about this case, although, if that's the thing that is going to concern you, when Mr. Gerber explained everything when he was on the stand, it would have been an easy question to ask, but he never asked it, and he will have

you believe something else.

Well, what about Sergeant Johnson? Sergeant Johnson goes to Mr. McLain's witnesses and he tells them these horrible things about Robert Cruz McLain, be they true or be they false, and Mr. McLain is upset at that, rightfully so.

What about Nellie? 1969, '70, '71, that period, she tells you Robert Cruz McLain is -- at that point in time -- she married him in 1969, and what is he like? He's like -- Mr. McLain is the way that all these people see him. Again, he's quiet, he's kind, he's helpful, he's respectful, he's polite, he's nice and kind to kids, he's immature, he's helpful to his niece, because his niece is the victim of some child molest at the hands of his niece's father, and he's nice in her eyes to his mother. H's a good son to her. And she tells you about Bob and Bob's feelings. Bob's mother dies, and he cries, cries in prison. He's upset, and she tells you something concerning the mitigating factor of age.

Robert McLain likes to hotrod around at 30 years old. Imagine revving your engine, driving around, cruising the boulevard, watching cowboy shows, hanging around teenagers, enjoying yourself in that manner, working in a gas station long hours. She tells you about the child that she married.

What about Noregon, one of Bob's captors? He was certainly a far cry better than the officer who's talking about, "Hey, why don't you escape? I'm going to shoot you if you do," or, "Don't escape. I'm going to shoot you," or however you interpret that evidence.

And Bob, this person who defies authority, who has a shank in his hand, who, if he's a killer, can certainly kill and relieve his hostilities and aggressions, and what does Noregon do? He inches away, looks out, and Robert McLain stands there, ordered by Mr. Brown not to leave the cell. Brown is the one who forces

Noregon against the wall. Brown is the one who's ordering Mr. McLain about.

But Bob's not a cop killer, and he's not killing those who are in charge of his custody. Bob says life is mierable[sic]. Well, he's damn right, life is miserable for Robert Cruz McLain.

I'm asking for life imprisonment for him, which isn't going to be a hell of a lot better. He's going to sit in the cell for the rest of his life, and that's not a picnic. It's a harsh, harsh reality, never to walk out again, never to know freedom, never to know the sunlight, never to play tennis or do the types of things we do.

I'm asking you for a harsh sentence, but I'm asking you for justice in view of the facts.

I would like to focus on Dr. Evans. Dr. Evans looks at Robert Cruz McLain and sees him, spends seven and a half hours with Robert McLain in this little, tiny cell, the interview room that I go to when I talk to Mr. McLain, and it's a tiny cell, according to the doctor. And this doctor's an expert in the field of psychology, and he looks at McLain. He spends basically a full day with him. He spends two working days. They total seven and a half hours, according to him, and he -- through his expertise and knowledge and his background, he views Robert McLain, and what does he say? You know, I look at Robert McLain and I know that three things created him and it's common sense -- and everybody is psychology knows that, and Mr. Kossoris certainly didn't refute that by bringing in evidence -- I examined Robert Cruz McLain and I know there had to be a father who was rejecting and extremely harsh and punitive, some such fathers sometimes turn disabled persons, a mother who is indifferent, and no parent substitute.

Now, I agree with Mr. Kossoris's statement that you can't just sometimes say, "I had an

unhappy childhood, and that's why I'm not out there working."

You can't say, "Well, gee, you know, if I had a '56 Chevy when I was a 17-year-old kid, I'd probably be okay today."

Those statements don't make it. Those statements aren't what we are talking about. We're talking about a grossly deprived child and what it causes.

Most of you have had children. I understand that one of you is raising a child at this point in time, at least, a newborn. Look at the ingredients of Robert McLain's childhood and look what it caused. Instead of a father that holds and plays with you and teaches you love and respect and caring, we have an aged, infirm old man who's desirous of just getting rid of you so you go away with the feelings of inadequacy and feeling not worthwhile.

Robert McLain's feelings, that Mr. McLain's father had to be extremely critical and punitive, and the facts are that he hit him with a cane. He beat him with branches of a rose bush. If you can imagine the perversity to do that -- you cut off the branches and you leave the thorns on, and you beat a child with that.

And Robert Cruz McLain's mother, somebody who is 60, not just a matter that you are not breast feeding the child all the time or giving him a bottle all the time. What does it take to produce Robert Cruz McLain? The mother's in her sixties. She doesn't want Bob. She can barely cope with her aged husband and does, at the very best, a minimal -- his background produces him.

And who is he? He's somebody who never learned to trust. And what does that mean? What does that tell you? Inability to trust. You have to cry when you sit back and think of the way Robert Cruz

McLain grew up. When he cried, nobody came; when he was hungry, nobody fed him; when he was wet, nobody changed him; when he needed love, nobody was there to hug him. And he received harsh punishments. There was nobody there for Robert Cruz McLain.

And who is Robert Cruz McLain? This gas station attendant, this dishwasher, this man whose reality is ugly and is harsh and is cruel. Bob's life is lousy and he gets up and he tells you that. Compare him to yourself; compare him to the way you knew you were; compare him to what you understand reality to be.

When I wake up in the morning, my bride sends me off to work with a hug. She makes me breakfast if I'm hungry. She calms me when I'm upset. She offers me praise when I feel inadequate. She has love to give me. When I see beauty, we share it together. She's a friend to me. I can tell my inner thoughts; when I want to play, I have friends.

What does Robert Cruz McLain have? He's deprived of all that. Robert Cruz McLain is a pathetic, sad person, and I suggest to you that you may have sympathies for him and that you may consider that.

Mr. McLain simply was not taught how to function. He's tragic and we don't annihilate the emotional cripples. That is not a sound decision, to put an emotional cripple into the gas chamber and execute them. It's not the proper thing to do in this case.

He's unable to cope with the world. He's unable to cope with reality. He's the victim of extreme harshness. We're not talking about a father who just says, "Well, listen, son, I'm kind of busy. Go away and I'll play with you later."

Robert McLain is a 40-year-old man, 41, who finds himself at some point in time washing dishes at Sambo's with retarded friends, who's taking in three

deprived juveniles to starve off loneliness and depression, that loneliness of his meager existence, and he cannot bear to look at the reality of it, and he can't see it as it is because it's too painful. He sees himself as some sort of Don Quixote, and he believes it. He looks at himself as some type of hero because those deep feelings of worthlesness[sic] and inadequacy surface, and they're impossible to bear.

Can you imagine being in that position, a total zero? You can't get along; you have no education; you have no hope and no comfort, and things are certainly worse for him today because he's going to go off into prison, if you are gracious enough to permit him to live; if in the kindness of your heart and your views of the evidence you feel that the mitigating factors outweigh the aggravating factors, he will walk off into some cold cement reality, and spend the rest of his natural life in captivity.

So we take a look at Robert Cruz McLain, and we look at him in the eyes of Dr. Evans and those who look at him -- those who know him, and you see that he's a human being, and that's part of his character, he's a person.

And I suggest to you that life itself is sacred and Robert Cruz McLain is a person who, when he's hurt, he feels pain; when he's rejected, he feels hurt. He's a person who, when you wince -- if you sneer at him, he winces. Bob cares. The most pathetic thing about this trial was Robert Cruz McLain looking at you, trying to combat Peter Kossoris, and telling you, "Gee, ladies and gentlemen, I don't care what you do." He's scared; he's afraid; he's hurt; he's devastated, especially after listening to the testimony of Dr. Evans about him, and he comes up with that macho, bravado answer, and how do you think he felt? What is he going to say to you? He's not even able to say, "Ladies and gentlemen, I beg you for my life." He can't even do

that.

Imagine what it's like to sit up at night and wonder what 12 people who you cannot even relate to are deciding whether or not to kill you, 12 people who reject your testimony, 12 people who don't believe you when you testify at your guilt phase of trial, 12 people who rely upon testimony of somebody like Lloyd Ketcherside and Zolando Hockett are going to seal your fate. It's got to be painful; it's got to be hard.

But in spite -- in spite of the negative features about Robert Cruz McLain, there are the positive features, and I want you to consider those positive features and weigh those very heavily. Robert Cruz McLain really enjoys helping people. He has the need to feel worthwhile. Robert Cruz McLain obtains his only emotional gratification by trying to help a child. Imagine that state of affairs. They are the only people who might respect him, who might look up to him, who might give him love and affection. He's an emotional cripple, and he deserves your pity.

Robert Cruz McLain, according to Dr. Evans, is probably at his best in prison. Why is that? Because he hasn't developed sufficiently to function on the outside; and with the strict supervision of prison, he's able to work, he's able to keep busy. He can help people pay their debts. He can get along.

And Mr. Kossoris offers these two meager bad reports, after 20 years of incarceration. That's no answer to the claim that Robert Cruz McLain ought to die. That's no answer at all.

THE COURT: Excuse me, Mr. Pell, but the reporter needs to reload the machine.

(Brief pause.)

MR. PELL: So in addition to the matters that I've talked about, I'm going to ask you to weigh heavily the mitigating circumstances. I'm going to ask you to examine Bob's past and note that he's paid a hell of a

price for his past, and that's mitigation. You know, if he walked away from a certain crime and didn't pay for it, probably have some sort of debt that he owes. But 1960 Robert Cruz McLain is accused of child molest, and he pleads guilty and he's incarcerated for it.

1962, the charges you have heard about, he plead guilty, and he spent seven years incarcerated.

1971, he goes to trial, and the product of his mind, if he did it, if you believe he did it -- I believe you -- I ask you to consider that he's unable to believe that he did it, if he did it, because he cannot view reality, and I ask you to consider that as a mitigating circumstance.

But, nevertheless, 1971, he is sentenced by our courts and he spends years in prison, eight years in prison for that. And he was punished for that, and we are not trying him in 1981 and we should not kill him for what occurred in 1971 because he paid the price for that.

He was incarcerated -- Mr. Kossoris had his day in court in 1971 and sent Mr. McLain to prison for years.

I ask you to consider the abuse Mr. McLain has taken and consider that in mitigation. I ask you to consider the fact that he's a product of his upbringing and his past, his years of incarceration and consider that in mitigation.

And I want to note for you that his brother Al's spent six years in the penitentiary. Apparently he got religion and God stepped in his life. He was out of trouble for a period of time. Mitigation. I asked you to consider the mitigation, goodness I talked about, in spite of the background, in spite of his past. He did these things for his mother, and I don't think you have to consider those things, considering the bandages, caring, providing for her, visiting her -- you must consider that in terms of his character and

background.

Jackie Smith, you have to consider Jackie Smith. You have to consider that he reached out to be a friend, that she writes to him, that she cares about him.

Mr. Kossoris would have you look simply at the pain. I ask you to look at the positive side. Andrea Carr. Mitigation. Robert Cruz McLain wanting to help her move -- he was concerned about her, whether or not she wanted his concern. And why do you think she didn't want his concern? She knew about his background. She didn't want to be involved with Robert McLain. "Hey, you may be my uncle, but I don't want to be bothered with you." She just rejected him.

But he came down here. He was concerned about her welfare, and the evidence on that is indisputable. And he wanted to help her and he wanted to move her, and if she was getting beaten up by her boyfriend, he wanted to help her.

Cindy Fund, he helped her move. He cared for her, cared for her child. He was nice to her, nice to the people at Sambo's. We heard no evidence in refute of that.

He helped Teddie and he got in over his head. He told Teddie that he would take him with him. He felt -- and his words were, "I felt that being as I had a hard way to go and ended up doing time all my life, Teddie deserved a chance," and he took Teddie in. Teddie from Florida authorities -- he took Lloyd in; he took Eddie Bennifield in. He gave these social rejects a place to stay, Lloyd and Teddie a place to stay free.

And notice in mitigation that before Teddie and before Lloyd, before those two juvenile delinquents came along, there was no murder. I want you to consider that, and consider that in relationship to what Dr. Evans had to say about the people who hang

around with Mr. McLain. They are the types of persons who would use and abuse Mr. McLain. Mr. McLain is not a leader. Someone said, "Some men see things as they are and say 'Why?' I see things that never were and say, 'Why not?'" -- Mr. McLain can't even see what's out there. He's no leader among men. He's no leader even among these juvenile delinquents.

Lloyd Ketcherside was living in a motel, unable to fend for himself, and Bob took him in. Lloyd Ketcherside, who was apparently hunted for something by somebody, got out of two deliberate, premeditated murders. Mitigation.

He helped others and paid for the debts, as I've indicated, stopped pressure from being put on people. And why does he function so well in prison? Because when he's guarded, when he's taken care of, when he's able to work, when he's able to be active, when he has a strict structure, he's able to stay out of trouble. And I've offered some of his prison records, R and D, and I ask you to look at them carefully and consider how he is in prison, and they describe a person that Mr. Kossoris certainly didn't describe to you, a man who's friendly towards most -- he drops from group therapy because he's going to be all right. Therapy is finished. He's doing okay.

1974, Bob learned that his mother is dead. He cannot attend the funeral. Work records show he's rather exceptional. He enjoys working. He's got a good job. Positive attitude. Doing excellent work. Doing very excellent work. Excellent producer. He has teamwork in willingness, outstanding ability in his work, a pleasant personality. He's neat and clean in appearance. That's what he is like in prison.

Note in contrast to how we perceive him on the outside, mitigation. He's poor. Mitigation. He probably saved the life of Officer Hind, the first man in that door. He probably stopped a blood bath. He's the

man who said, "No shooting." He's the man who took the rifle and put it back in the bedroom. That, ladies and gentlemen, is mitigation. Remorse is also an aspect of mitigation. He tells you through Dr. Evans that Bob has no guilt feelings about the things that he's admitted. He's done his share of burglaries, and he had no shame about that.

Now, he went to prison for eight years for burglary, and "I paid my debt," but Bob is concerned over the tragic deaths of two women and his feelings and emotional tone as observed by a skilled psychologist is that it's too bad it occurred; it's unfortunate; it's a terrible thing to have occurred, and he was concerned and unhappy about that.

I'm going to ask you again to consider and weigh, when you weigh the delicate balance of a man's life, what you are doing -- you are supposed to be meting out justice, and I want you to consider that, consider Robert McLain and consider Lloyd Ketcherside.

Peter Kossoris argues now that each shot her one time. Or, that true, think of a quality of sentencing -- or that not true, think of what Teddie Willis had to say. "I shot her in the face multiple times." You know he did.

So under the facts of this case, can you cooly[sic] and intelligently calculate and vote for the death of Robert McLain and in your heart say, "We have meted out justice. This was a true and decent thing to do under all the facts of this case, under weighing everything in this case. The appropriate thing to do was to watch Lloyd Ketcherside walk out of the courtroom and send another man to his death"? Can you do that in logic and reason and fairness and justice, knowing the sanctity and importance of life? Can you shed Robert's blood and stain your hands with his blood, knowing that?

You know, in the heat of a courtroom battle and discussions that you all will have in deliberations, it's easy to obscure your visions, but, dear God, please consider what you are doing. I know you will. You were carefully selected, and I know that you will consider what you are doing in this case.

Balance Mr. McLain. Balance his past. He's paid for his transgressions up to 1979 with hard years in prison. He's been isolated, and he's been lonely.

When you weigh and tip the scales and you figure out what is aggravation and what is mitigation, I think that those areas of mitigation, in view of his severe, severe emotional condition, which is the result of something beyond his control, I think you have to tip the scales in favor of life. I think that's where the scales belong.

You are now gods, and you have to face the fact that Mr. McLain's life is in your hands to either give it or take it, and I think that you have to know that killing here is very, very wrong. You must face the awesome responsibility of knowing right from wrong and knowing that in this case, to kill with the voice of the state is wrong. The facts don't justify it. It makes you no better than that which you would condemn under these facts.

Consider your own lives and compare that with Mr. McLain's and consider how Bob will be unable to have a sweet life or precious life in prison. Think of how close life without parole is to the sentence of death, because they're really two forms of death; one is without the ability to be corrected; the other is a form of death in total isolation.

Killing is wrong here because Bob is infirm, and we shouldn't kill the infirm. We can never truly know what happened in this case. If you believe that you truly know what happened in this case, I ask

you to stop and pause and ask yourself if you are being honest with yourself.

Under the facts of this case and the muddled evidence in this case, you have to wonder if there's evan[sic] a standard to even consider executing Mr. McLain here. A vote to kill here removes any sense of fairness, decency.

I ask you for a positive vote. I ask you for a merciful vote. I beg of you to let God almighty call Mr. McLain from this life. I beg you for Bob's life.

Thank you.

THE COURT: Ladies and gentlemen, we will take five minutes and then we will reconvene, whereupon I will instruct you as to the law. Please keep the Court's admonition in mind during the Court's recess. You are not to discuss the case among yourselves nor with any other persons nor form or express any opinions on it until it's finally submitted to you.

Five minutes, please.

(Recess.)

THE COURT: Record will show the members of the jury present; counsel and defendant are present.

Ladies and gentlemen, once again, at the conclusion of these instructions, you will be furnished with a complete set of the instructions that I am about to give to you.

Also, should you so request, you will be furnished with a set of instructions that were given to you at the conclusion of the guilt phase of the trial.

Also, you will be furnished with all of the items received in evidence at this phase; and should you request, you will be furnished with all the items of evidence received in the guilt phase.

Ladies and gentlemen of the jury, the defendant in this case has been found guilty of murder of the first degree. The charge that the murder was

committed under one or more of the special circumstances has been found to be true. It's the law of this state that the penalty for a defendant found guilty of murder of the first degree should be death or confinement in the state prison for life without possibility of parole in any case in which the special circumstances charged in the case have been found to be true.

It's also the law of the state that the penalty for a defendant found guilty of murder in the first degree who did not commit the act or acts causing the death but who intentionally aided, abetted, counseled, commanded, induced, solicited, requested, or assisted in the commission of a murder in the first degree should duffer[sic] death or life without possibility of parole in any case in which the special circumstances charged in this case have been found to be true.

Under the law of this state, you must now determine which of said penalties should be imposed upon the defendant. In determining which penalty is to be imposed on the defendant, you should consider all the evidence which has been received during any part of the trial in this case, including but not limited to the defendant's character, background, history, mental and physical condition, and matters relating to sentence.

You should consider, take into account, and be guided by the following factors, if applicable:

A, the circumstances of the crime of which the defendant was convicted in the present proceeding and the existence of any special circumstances found to be true;

B, the presence of absence of criminal activity by the defendant which involved the use or attempted use of force or violence or the express or implied threat to use force or violence;

C, the presence or absence of any prior felony conviction;

D, whether or not the offense was committed while the defendant was under the influence of extreme mental or emotional disturbance;

E, whether or not the victim was a participant in the defendant's homicidal conduct or consented to the homicidal act;

F, whether or not the offense was committed under circumstances which the defendant reasonably believed to be a moral justification or extenuation for his conduct;

G, whether or not the defendant acted under extreme duress or under the substantial domination of another person;

H, whether or not at the time of the offense the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was impaired as a result of mental disease or defect or the effects of intoxication;

I, the age of the defendant at the time of the crime;

J, whether or not the defendant was an accomplice to the offense and his participation in the commission of the offense was relatively minor;

K, any other circumstances which extenuate or mitigate the gravity of the crime, even though it's not a legal excuse for the crime.

Evidence has been received of statements attributed to the defendant which may reflect upon his attitude or intent to commit crimes in the future. Such evidence, if believed by you, may be considered only for the limited issue of the defendant 's character, mental state, and condition, if you determine that it bears thereon.

Specifically, you are not permitted to consider such evidence in determining whether to impose the death penalty on the theory that the defendant may commit future crimes or that it suggests

the defendant's propensity to commit future crimes, as that is not a proper subject for your consideration.

For the limited purpose for which you may consider such evidence, you must weigh it in the same manner as all other evidence in the case. Evidence of any crime for which the defendant was not tried and is alleged to have been committed by the defendant may not be considered as evidence in aggravation unless proved beyond a reasonable doubt. Reasonable doubt is defined as follows:

It's not a mere possible doubt, because everything relating to human affairs and depending on moral evidence is open to some possible or imaginary doubt. It's that state of the case which, after the entire comparison and consideration of all the evidence, leaves the minds of the jurors in that condition that they cannot say they feel an abiding conviction to a moral certainty that such crime has been committed by the defendant.

Evidence of a prior felony conviction of the defendant may not be considered as evidence in aggravation unless said prior felony conviction is proved beyond a reasonable doubt. Reasonable doubt is defined as follows: It's not a mere possible doubt, because everything relating to human affairs and depending on moral evidence is open to some possible or imaginary doubt. It's that state of the case which, after the entire comparison and consideration of all the evidence, leaves the minds of the jurors in that condition that they cannot say they feel an abiding conviction to a moral certainty that the defendant did suffer said prior felony conviction.

I instruct you as a matter of law the prior felony convictions of the defendant have been proved beyond a reasonable doubt.

You are instructed that under the State Constitution a governor is empowered to grant a

reprieve, pardon, or commutation after sentence following conviction of a crime. Under this power, a governor may in the future commute or modify a sentence without -- of life without possibility of parole to a lesser sentence, which would include the possibility of parole.

You are further instructed that such power by a governor to commute or modify a sentence is not to be considered by you in determining whether the defendant should be sentenced to death or life imprisonment without the possibility of parole.

You may not speculate as to if or when a commutation or modification would or would not be granted to the defendant. It's not your function to decide now whether the defendant will receive such a commutation or modification at some future date. So as far as you are concerned, you are to decide only whether the defendant should suffer the death penalty or should be permitted to remain alive under the sentence of life imprisonment without the possibility of parole.

If upon consideration of the evidence and instructions you conclude that life imprisonment without the possibility of parole is the proper sentence, you must assume that the governor will perform his duty in a correct and responsible manner and will not commute this defendant's sentence unless convinced that he should be eligible for parole and can be safely released into society, in a correct and responsible manner.

It would be a violation of your duty as jurors if you were to fix the penalty at death because of a doubt that the governor will properly carry out his responsibilities.

You have been instructed before deliberations in the guilt phase and at this time as to all the rules of law that may be necessary for you to reach a verdict. Whether some of the instructions will apply

will depend upon your determination of the facts.

You will disregard any instruction which applies to a state of facts which you determine does not exist. You must not conclude from the fact that an instruction has been given, that the Court is expressing any opinion as to the fact.

The written instructions now being given will be made available in the jury room during your deliberations. The written instructions given before deliberations in the guilt phase will be made available in the jury room during your deliberations, if you so request. They must not be defaced in any way.

You will find that the instructions may be either printed, typewritten, or handwritten. Some of the printed or typewritten instructions may be modified by typewriting or handwriting. Blanks in the printed instructions may be filled in by typing or handwriting.

Also, portions of printed or typewritten instructions may have been deleted by lining out. You are not to be concerned with the reasons for any modifications that have been made.

Also, you must disregard any deleted part of an instruction and not speculate as to either what it was or what is the reason for its deletion. Every part of an instruction, whether it's printed, typed, or handwritten, is of equal importance. You are to be governed only by the instruction in its final wording, whether printed, typed, or handwritten.

It's now your duty to determine which of the two penalties, death or confinement in the state prison for life without the possibility of parole, should be imposed on the defendant.

After having heard all the evidence and after having heard and considered the argument of counsel, you should consider, take into account, and be guided by the applicable factors of aggravating and mitigating circumstances upon which you have been

instructed.

If you can conclude that the aggravating circumstances outweigh the mitigating circumstances, you should impose the sentence of death. However, if you determine that the mitigating circumstances outweigh the aggravating circumstances, you should impose a sentence of confinement in the state prison for life without the possibility of parole.

You should now retire and select one of your number to act as foreman, who will preside over your deliberations.

In order to make a determination as to the penalty, all 12 jurors must agree. Any verdict that you reach must be dated and signed by your foreman on a form that will be provided and then you should return with it to this courtroom.

The clerk will swear the bailiff.

(The bailiff was sworn by the clerk to take charge of the jury.)

THE BAILIFF: I do.

THE COURT: Bailiff will conduct the 12 persons constituting the jury to the jury deliberation room. The alternates will remain.

I will see counsel at the bench.

(Discussion held at the bench, off the record.)

THE COURT: Ladies, counsel have indicated to me that they are prepared to stipulate on the record that you need not be placed in custody of a sheriff while the jury deliberates upon their verdict; that you may return to your homes and/or to your jobs, subject to being called, of course, should your services be needed in deliberations.

So you are not at all discharged from further service in this case. You remain continually subject, of course, to the Court's admonition until you are discharged. And when you are discharged, you will

be so notified by the clerk of this court.

In the meantime, you remain prohibited from discussing this case amongst yourselves or with any other persons or forming or expressing any opinions on it until the case is finally concluded or until such time as you may deliberate upon it.

You remain subject to the Court's prohibition against reading any newspapers published in the County of Ventura until such time as you are discharged from service, as well as from reading any newspapers published in the County of Los Angeles.

And we have, I believe, your home and work phones, where you can be contacted should you be needed. It may come to pass that you will not be needed to deliberate upon this verdict. And consequently, it may come to pass that I will not be seeing you again in connection with this case.

I'd like you to know how strongly I feel about this service of an alternate juror and what a vital function you play in the entire trial process and indeed in the administration of justice, because I think you know now that were it not for persons such as yourselves who are ready, able, and willing to replace a regular juror at any time, should a juror no longer be able to continue with her service, and were you not available, we have to go back and start it all over from the very beginning.

So should you not be pressed into further service on this case, you ought to leave today with the feeling that you have indeed rendered an invaluable contribution to the administration of justice to the people of this county as well as to the people of our state. Your service is deeply appreciated by the Court as well as by all counsel.

Do I have any questions before I excuse you at this time?

All right. Have a good day, ladies, and

please keep the Court's admonition in mind, and you will be kept informed as to your status by the clerk of this court. Thank you.

(The alternate jurors departed the courtroom and the following proceedings were held in open court:)

THE COURT: Record will at this time show the alternates departed the courtroom. Counsel is present; defendant is present; of course, the jury has since retired upon its deliberations.

I would like to get counsel's position on the record. May it be clear on the record at this time counsel stipulate to the procedure of having the jurors, the alternate jurors, on a stand-by status.

MR. PELL: That is correct.

MR. KOSSORIS: Yes.

THE COURT: I would like to get counsel's view on the record now with respect to their feeling of admonition at each recess of deliberation as well as adjournment in deliberation.

MR. KOSSORIS: Stipulate to them not having to do that.

MR. PELL: So stipulated.

THE COURT: All right. The record will reflect, then, at this time that both sides have stipulated the jury need not be admonished at each recess and adjournment.

Do counsel desire they be admonished today before we leave, or would you just as soon have your stipulation apply throughout their deliberations?

MR. KOSSORIS: I would just as soon have it apply throughout -- I don't think it's necessary. Only thing I would request is we be notified by telephone by someone connected with the court whenever they have left for the day.

THE COURT: We have done that in the past, and we will certainly follow that procedure.

MR. PELL: That's not agreeable to the defense. I would ask the Court to bring them in and indicate to them that they will not be admonished at each recess for each day's adjournment but they are reminded that they should keep the admonition in mind and during the course of their deliberations, they are under the admonishment.

THE COURT: I take it outside of that admonishment today, your stipulation would apply to all future recesses and adjournments?

MR. PELL: Yes.

THE COURT: All right. We will bring them in today when they have completed their deliberations for today. Counsel will have to be here, of course, as well as the defendant.

MR. PELL: That would be either Mr. Eskin or myself; is that correct?

THE COURT: All right.

Anything else counsel want on the record before we recess?

MR. KOSSORIS: No.

MR. PELL: Do you want counsel present at any particular time to review the exhibits that are being sent in?

THE COURT: I would like for you to take some time with the clerk now, if you would, to look over the exhibits that will go into the jury room and also I would -- I will have the jury back tomorrow morning at 9:00 o'clock -- I do want counsel available throughout tomorrow on 20 minutes' call -- of course, as well as the defendant. I do, of course, want counsel to review the exhibits that will be going into the jury room, and I would suggest you do that now.

All right. The court's in recess.

(Recess.)

(The following proceedings were held in open court, within the hearing and

presence of the jury:)

THE COURT: Record will show the members of the jury present; counsel and defendant are present.

Ladies and gentlemen of the jury, counsel have stipulated that you need not be admonished at each recess and adjournment of your deliberations. Nonetheless, out of an abundance of caution, at this time I want to remind you as to what your duties are during the time that you are not actually in deliberations. That is, of course, with all 12 of you present.

You should keep in mind that you may not permit yourselves to be addressed by any person on any subject matter in this trial, either directly or indirectly. This includes your husband, your wife, your neighbor, and your friends. This means that you are not to talk about this case, including what has gone on in the deliberation room thus far, to anyone, and you are not to permit anyone to talk to you about it, and I reiterate, neither directly nor indirectly.

You may not converse among yourselves on any matter pertaining to this case during any recess or adjournment. This means that you are not to call each other up or discuss it or get together in any small groups to discuss the case.

You are further admonished that you are not to express any opinion on this matter until tomorrow morning when you are once again in the deliberation room and then only after all 12 jurors are present.

You are also to keep in mind the Court's prohibition against reading any newspapers published in the County of Ventura and listening to any newscasts emanating from the County of Ventura.

Have a nice evening. I direct your return tomorrow at 9:00 a.m. to resume deliberations. Thank you.

(The following proceedings were held in open court, outside the hearing and presence of the jury:)

THE COURT: Members of the jury have now left. I direct counsel's on-call status commencing at 9:20 tomorrow morning and 20 minutes' call, and we will of course notify you that should you -- at what time the jury will adjourn tomorrow.

Counsel desire anything further on the record at this time?

MR. KOSSORIS: No.

MR. PELL: I would like Mr. McLain tomorrow and Saturday to have a call to me, and I would like -- he would like to get a haircut.

THE COURT: So ordered.

(End of requested transcript.)

VENTURA, CALIFORNIA; FRIDAY, APRIL 10, 1981; 9:00 AM

(On the following dates the jury continued its deliberations and there were no court appearances and no proceedings reported: April 10 and April 13, 1981.)

VENTURA, CALIFORNIA; TUESDAY, APRIL 14, 1981; 9:05 A.M.

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(Whereupon the jury continued their deliberations with no court proceedings or court reporter present until 11:15 A.M. at which time they returned their verdicts.)

REPORTER'S CERTIFICATE

STATE OF CALIFORNIA)
) ss.
COUNTY OF VENTURA)

I, ARLENE S. STONE, Certified Shorthand Reporter, do hereby certify that the foregoing pages, 1 to 130 [1 to 104], inclusive, comprise a full, true, and correct transcript of the proceedings had upon the trial of the above-entitled action on April 9, 1981, and that said transcript contains all of the evidence, all of the objections of counsel and rulings of the Court, and all matters to which the same relate.

Dated this 7th day of July, 1983

SIGNED

ARLENE S. STONE
CSR No. 3012